STATE OF INDIANA)
) SS:
COUNTY OF DELAWARE)

IN THE DELAWARE COUNTY SUPERIOR COURT

CRAIG DUNN and PHILIP WILEY, et al.,)
Plaintiffs,)
)
-v-) CAUSE NO.
) 18D01-9305-CT-06
RJR NABISCO HOLDINGS CORPORATIONS, et al.,)
Defendants.)

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STEWART-RICHARDSON & ASSOCIATES
Registered Professional Reporters
Capital Center, South Tower
201 N. Illinois Street
Suite 1700
Indianapolis, IN 46204
(317) 237-3773

APPEARANCES

FOR THE PLAINTIFFS:

YOUNG & YOUNG
James H. Young, Esq.
John Young, Esq.
Joseph Young, Esq.
128 N. Delaware
Indianapolis, IN 46204

YOUNG & RILEY
William N. Riley, Esq.
277 E. 12th
Indianapolis, IN 46202

CROSS MARSHALL SCHUCK DeWEESE CROSS & FEICK
P. Gregory Cross, Esq.
200 East Washington Street
Muncie, IN 47307

Max Howard, Esq.
403 W. Eighth Street
Anderson, IN 46016

NESS MOTLEY LOADHOLT RICHARDSON & POOLE
Ronald L. Motley, Esq.
P.O. Box 1137

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Charleston, SC 29402

FOR THE DEFENDANTS:
RJR NABISCO AND R.J. REYNOLDS

KRIEG DEVAULT ALEXANDER & CAPEHART
Richard D. Wagner, Esq.
James G. McIntire, Esq.
One Indiana Square
Suite 2800
Indianapolis, IN 46204
WOMBLE CARLYLE SANDRIDGE & RICE
Jeffrey L. Furr, Esq.
200 West Second Street
Winston-Salem, NC 27101

FOR THE DEFENDANTS:
PHILIP MORRIS, BROWN & WILLIAMSON & LORILLARD

SHOOK HARDY & BACON, LLP
William S. Ohlemeyer, Esq.
One Kansas City Place
1200 Main Street
Kansas City, MO 64105

FOR THE DEFENDANTS:
PHILIP MORRIS

BINGHAM SUMMERS WELSH & SPILMAN
David O. Tittle, Esq.
10 W. Market Street
Suite 2700
Indianapolis, IN 46204

FOR THE DEFENDANT:
AMERICAN TOBACCO COMPANY

DEFUR VORAN HANLEY RADCLIFF & REED
Scott E. Shockley, Esq.
201 East Jackson Street
Suite 400
Muncie, IN 47305

FOR THE DEFENDANT:
THE COUNCIL FOR TOBACCO RESEARCH

McHALE COOK & WELCH, P.C.
Daniel P. Byron, Esq.
320 N. Meridian
Suite 1100
Indianapolis, IN 46204

FOR THE DEFENDANT:
B.A.T. INDUSTRIES PLC

LOCKE REYNOLDS BOYD & WEISELL
Hugh E. Reynolds, Jr., Esq.
1000 Capital Center South
201 N. Illinois Street
Indianapolis, IN 46204

FOR THE DEFENDANT:

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THE TOBACCO INSTITUTE, INC.

Charles W. McNagny, Esq.
1600 Lincoln Tower
116 East Berry Street
Fort Wayne, IN 46802

MR. CASSELL: All rise.
THE COURT: Be seated.
Good morning, ladies and gentlemen.
ALL: Good morning.
THE COURT: Jury appears in its entirety.
Good morning, Counsel.
ALL: Good morning, Judge.
THE COURT: Defense ready to call its next?
MR. OHLEMEYER: Yes, we are, Your Honor.
THE COURT: All right, Mr. Ohlemeyer.
MR. OHLEMEYER: Your Honor, the defendants call Dr. Scott Appleton.
THE COURT: Raise your right hand.

DEFENDANTS' WITNESS, SCOTT APPLETON, SWORN

THE COURT: Have a seat, please. Would you tell the jury your name, sir.
THE WITNESS: Scott Appleton.
THE COURT: Would you spell your last.
THE WITNESS: Just like apple, A-P-P-L-E-T-O-N.

THE COURT: Thank you.
Mr. Ohlemeyer.
MR. OHLEMEYER: Thank you, Judge.

DIRECT EXAMINATION

BY MR. OHLEMEYER:

Q Good morning, Dr. Appleton.
A Good morning.
Q Tell us where you work.

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A I work for Brown & Williamson Tobacco Company.
Q And where are they located?
A Well, they have several locations, but I'm located in Macon, Georgia.
Q And where are their -- do they have other facilities in the United States?
A Yes, they do.
Q Where?
A Their main administrative offices are in Louisville, Kentucky. They've also got operations in Winston-Salem and Lancaster, and one in Virginia.
Q What's your job or your title at Brown & Williamson?
A My title is director of scientific and regulatory affairs.

THE COURT: I'm not sure I heard that. Would you speak up just a little bit.
THE WITNESS: I'm sorry. I'll try to speak into the mike. It's director of scientific and regulatory affairs.
THE COURT: Thank you.
Q Tell us what the director of scientific and regulatory affairs does at Brown & Williamson.
A I've got a range of tasks that falls into three major areas. One is to evaluate and assess ingredients and materials used in the manufacture of cigarettes for regulatory compliance and for overall acceptability. The other is to monitor the science concerning smoking and health and maintain technical expertise in that area. And finally, the third responsibility is to address and respond to regulatory initiatives and provide overall technical support in various technical issues that come up concerning cigarettes.
Q How long have you been at Brown & Williamson?
A I guess it's about seven years, maybe going

on eight now.
Q Doctor, tell us about your education, your college education.
A Okay. Well, I've got a bachelor's degree in human nutrition and food science obtained from the State University College at Buffalo, State University of New York College at Buffalo. I've got a master's degree in human nutrition with a minor in toxicology from Iowa State University, and a Ph.D. in environmental toxicology from Cornell University.
Q Doctor, we've heard a little bit about toxicology. Just generally and briefly tell us what the study of toxicology involves.
A Well, I guess there's several definitions, but generally it could be looked at as the

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study of poisons or the study of the harmful effects of chemicals on biological systems.

Q What is environmental toxicology?

A That would be more focused with the study of chemicals originating from the environment.

Q When you did your Ph.D. work, was that the major focus of your study?

A The focus of my study was looking the role

of one environmental substance, namely aflatoxin. Aflatoxin is a carcinogen which occurs naturally in foods, and I was studying the effect that it has on animals in producing cancer and specifically the role of diet and how their different duties might influence the progression and outcome of cancer induced by aflatoxin.

Q Are you a member of any professional societies that relate to toxicology?

A Yes, I am. I'm a member of the Society of Toxicology.

Q And what is the Society of Toxicology?

A It's the professional society that people in my field attend a meeting once a year where research is exchanged, various debates occur, symposia and workshops are developed on various topics where people can maintain current knowledge about the field of toxicology and regulatory matters as well. A lot of people from the FDA and EPA and OSHA and so forth attend the meeting as well.

Q Have you ever been involved with an organization known as FEMA, F-E-M-E?

A F-E-M-A, yes.

Q F-E-M-A.

A That's the Flavors and Extracts Manufacturers Association, yes. I've sat on various committees from that organization.

Q What is that organization?

A That's the trade association that represents a segment of food ingredient manufacturers, specifically flavor ingredients.

Q Have you served on any committees with FEMA?

A Yes, I served on the safety evaluation and coordinating committee.

Q What does that committee do?

A That's the committee that serves essentially as the interface between the trade association on the one hand and the independent expert panel that evaluates ingredients for what we call GRAS status, G-R-A-S, which is an acronym for generally recognized as safe.

Q And what's the purpose of that kind of analysis?

A Well, there are provisions in the Food Drug and Cosmetic Act which permit either the FDA or individual private citizens to evaluate

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the safety of food ingredients. And if they are qualified and if the evidence is sufficient, they can judge these substances to be generally recognized as safe. And then that gives it a certain regulatory status; namely, it then becomes permitted for use as a direct food ingredient or direct food additive.

Q There's been a lot of discussion in this case about ingredients added to tobacco in the manufacture of cigarettes. Are you familiar with the types of ingredients that are added to tobacco in the manufacture of cigarettes?

A Yes, I am.

Q Are those ingredients on the FEMA GRAS list?

A Most of them are. The flavors are. Not all the ingredients added to tobacco products are flavor ingredients, per se.

Q If they aren't flavor ingredients, what are they?

A Well, some of them are foods, like things like sugar or molasses or brown sugar, cocoa. They may not necessarily be a flavor ingredient, so therefore they may not have

been reviewed for GRAS status by the FEMA expert committee, but they may be foods, per se.

Q Would you tell us what you did before you got to Brown & Williamson, sir.

A Well, my immediate position was as manager of regulatory affairs for a flavor company, a company which at the time was called Freeze and Freeze. They've since then changed their name to Taste Makers. They sell flavor ingredients to a variety of food manufacturers. The position I held prior to that was with RJ Reynolds Tobacco Company, and the position I held prior to that was a position with a food company.

Q What did you do for the food company?

A I was a scientist who was involved in -- well, a couple of things, but mostly I oversaw a research program which was a funding program for funding external research, funding various investigators, mostly in the area of diet and cancer.

Q And what did you do at RJ Reynolds?

A One similar activity to what I'm doing for Brown & Williamson, namely, I reviewed the

acceptability of various ingredients and materials used in the manufacture of cigarettes.

Q And then at Freeze and Freeze, what did you do?

A Similar, but I provided, mostly provided a lot of documentation to support the regulatory status of various ingredients. I

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would make submissions to the USDA, for example, to obtain an opinion on how a particular flavor ingredient might be labeled on a customer's product if they used it. I would provide material safety data sheets for flavors, disclosures, ingredient labeling information, kosher certifications, that sort of thing.

Q Dr. Appleton, is there a library at Brown & Williamson?

A Yes. We have a library.

Q What type of library?

A Well, we have collections of various types of journals, scientific journals mostly. They span mostly the areas of tobacco chemistry, food chemistry, health-related matters, engineering, mostly technical

areas, pretty much in those areas.

We have collections and holdings of internal reports that we generate or receive from our sister companies. And we also have on-line capabilities for searching any number of databases which are available on-line for various types of information.

Q And what's the -- are you involved at all in maintaining that information?

A Well, the library is not within my area of responsibility. I'm not sure.

Q Do you use it?

A Oh, yes.

Q And --

A Daily.

Q For what purposes do you use it?

A To do research. To do literature research and to obtain information about various issues.

Q How long has there been such a library at Brown & Williamson?

A I don't know. As long as I've been with Brown & Williamson there has been. I don't know when the library began.

Q Are you familiar with a report or a book

known as the Banbury Report?

A Yes.

Q What is the Banbury Report?

A Well, there's several Banbury reports, but one that I've got in my office, for example, is a report of a -- it was sort of a workshop or a meeting. It's proceedings of a workshop or meeting that was held to discuss and review how -- what might be the attributes of a safer cigarette or how one might go about making a safer cigarette or what would be a strategy for developing a safe cigarette.

Q And is this a copy of that report?

A It looks like it, yes.

Q And am I correct this conference or this meeting occurred sometime in the late '70s?

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A I believe so.
Q Who was involved or participated in this?
A I don't recall everyone, but I know that people from the American Health Foundation, such as Ernst Wynder and Dietrich Hoffmann, were involved, and Geo Gori may have been involved. That would have been within his time frame.

Q Now, let's assume, Dr. Appleton, that I've been hired at Brown & Williamson in the late '80s in the research department and that I want to become familiar with the so-called safe or safer cigarette issues. Is this a book I could have found or would have found in the Brown & Williamson library?
A That's among the books that would be found, yes.
Q How hard would it have been for me to go to the library and find this book?
A Well, not hard at all. You can go to the library and ask the librarian for the book and she would take you to it, or you could look it up in the card catalog, or we now have an on-line holdings directory. We don't have a card catalog anymore. But you could either look it up on-line or ask the librarian for it.
Q Would I have had to ask anyone in the legal department whether I could check this book out of the library?
A No.
Q Dr. Appleton, what is the British American Tobacco Company?

A British American Tobacco Company is -- is the -- well, if you mean BATCO, is a sister company to Brown & Williamson. They're located in England.
Q Do they make cigarettes?
A Yes.
Q And what's the relationship between Brown & Williamson and the company in England that makes cigarettes?
A We're sister companies.
Q Which means?
A Well, we're jointly owned by a larger company, a holding company, BAT. But we're essentially sister companies under this larger holding company.
Q Dr. Appleton, you mentioned, I think, a substance call aflatoxin?
A Yes.
Q And you described it as a carcinogen.
A Yes.
Q Tell us what you mean by a carcinogen.
A Well, when I use the word carcinogen, and when most people use the word carcinogen, what they're typically referring to are substances that have been tested in

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long-term animal studies, usually rats and mice. And the way these substances are tested is they feed the animal what's called the maximum power rated dose, which is the maximum dose they can tolerate and still live the majority of their life span, which is typically two years for a rat or a mouse.

Under the conditions of that test, what's done is an untreated control group, the cancer incidence in an untreated control group is compared to the cancer incidence in the group that receives the high dose. And if, in fact, the high dose produces a higher incidence of cancer, the substance is judged to be a carcinogen.

And when people talk about carcinogens, 90 percent of the time they're probably referring to what I call an animal carcinogen; namely, it's been shown to produce cancer in animals.

Now, in the course of the history of testing compounds in this method, there's been about 500 substances tested this way. It hasn't been that many because the tests are very long and very expensive and very

laborious. And throughout the history of that testing, approximately half of all substances that have been tested in that manner have, in fact, been judged to be carcinogens. And that's been pretty much the track record from when this program began, and this testing began in the late '70s.

So basically half of everything that's been tested has been judged to be a carcinogen and I would -- I would say that if you could test every chemical in the world, half of all chemicals would be ultimately judged to be carcinogens, if tested under those conditions.

Q What's the relationship or -- let me rephrase the question.

If a substance is determined to be a carcinogen in a test involving animals, is it more or less likely that it's going to be a carcinogen with respect to human exposure?

A It depends entirely under the conditions of exposure. Because the substances are tested at such high doses in the animal studies, you cannot assume that any contact with that

substance under any circumstances will cause cancer in humans. What it really comes down to is what the dose is, what the exposure is that a human may get compared to the dose that caused the effect in the animals.

Q How does a maximum tolerable dose used in an experiment like this compare to exposure in real world situations?

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A It depends which substance you're referring to and which real world situation you're referring to. We were talking about aflatoxin. Aflatoxin is typically present in diet at very low levels. It occurs naturally in peanuts and corn, in a variety of other grains, typically less than five parts per billion, so its levels are quite low. And in a typical U.S. diet or western diet, I don't believe that scientists feel that aflatoxin is causing cancer in humans.

Q How do you measure the amount or the level of a carcinogen in somebody's diet or in some other situation?

A It depends largely on the substance and the analytical procedure that would be used to determine the presence of the material, and

the concentration of the material would be entirely dependent on the type of material, but most organic materials are tested by gas chromatography, mass spectroscopy.

Q And when and how did that equipment or that technique get developed?

A Well, I'm not an expert in analytical chemistry, so I'm not sure really about the history of it. It's been an evolving process in that analytical methodology and techniques become more and more refined as time goes on to the point where we can detect trace levels of just about anything, just about anywhere, if you want to.

Q And, Dr. Appleton, you mentioned that these are typically feeding studies?

A Typically, that's the most.

Q Explain to us what a feeding study is.

A There are several ways you can administer substances to animals. You can put it in the diet, you can do what is called gavaging, which is take a tube and pump it into their stomach; you could put it on their skin, you could present it by inhalation, you could inject it.

But the most common is to actually put it in the animal's diet and feed it to them, because that's the easiest and least expensive way to do it. And usually these assessments are for substances that are present in the diet, so that would be the most appropriate way to do it.

Q Do you know or are you familiar with a way to conduct a test called an installation experiment?

A Well, if you're referring to pulmonary installation, yes, that's a method of administering substances to animals.

Q What is pulmonary installation?

A That would be where you take a tube and put it into the animal's lungs and then pump the material into their lungs.

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Q Would that be a different route of exposure than inhalation?
A Well, certainly, yes. It would have -- it would be expected to have much different effects than inhalation.
Q Now, Dr. Appleton, are there carcinogens, as you've defined them, in cigarette smoke?
A Well, there's carcinogens everywhere; in the

air we breathe, in the food we eat, in the water we drink, including cigarette smoke.
Q How is it or why are there carcinogens in cigarette smoke?
A Well, a lot of them occur naturally in the environment. Some of them occur as a result of burning. When you burn material or heat material, carcinogens can be formed, and this occurs when you cook your food. In fact, there's a lot of carcinogens in cooked food.

But if you, obviously, heat tobacco or burn tobacco or wood or anything, other organic matter, then certain carcinogenic substances will be formed as a result of the burning process.

Q What effect does adding flavors or other ingredients to tobacco have with respect to the creation of carcinogens?
A Well, we've looked at that extensively in detail, and the evidence that we've seen, both in the external literature and in studies that we've done, suggests that adding additives doesn't have any material effect on the character of tobacco smoke

insofar as health effects is concerned. This is largely because the things that are typically added to cigarettes are natural materials, like sugar and cocoa and honey, which are essentially the things that tobacco is made out of. Tobacco actually has a fairly high sugar content naturally.

And tobacco also is composed of things like cellulose and proteins and fats and carbohydrates and other materials which are pretty much the same things that these additives are made out of. So when you're adding them to tobacco and burn them, you get pretty much the same things that you get when you burn tobacco. And various toxicological tests that have been performed essentially verify that.
Q What about the flavors that are added? What happens when they burn?
A Well, flavors are sort of a different category because, for one thing, they're added at extremely low levels. They're at very minute quantities, and they tend to be volatile which means they evaporate very rapidly. So flavors tend to not be burned.

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They tend to just volatilize; as a cigarette cone proceeds down the cigarette, they become vaporized and transfer into the smoke intact.

Q Explain that. What does that mean, vaporize and transfer --

A Well, it's like when something evaporates. If you have a hot griddle, and you put a drop of water on it, it will eventually evaporate, boil and evaporate. That's what happens when flavor ingredients are in a cigarettes. As the cone of the cigarette proceeds down the tobacco rod, the flavor that's in immediate contact will boil in a little micro environment, vaporize, and then travel down the cigarette rod intact as a vapor, or as a gas, just like water will if you heat it. It turns into a gas.

Q So some of the ingredients or some of the flavors don't actually burn.

A That's what some of our experimental evidence indicates, yes.

Q Are you familiar with -- do you know what the phrase English cigarettes or Virginia cigarettes refers to?

A Yes.

Q What is that?

A Well, in England, in parts of Europe and other parts of the world, the preference of consumers is to smoke a cigarette that's made of all Virginia tobacco. There's several kinds of tobacco. There's what's called Virginia, which is the same as flue-cured. Then there's burley, which is largely grown in Kentucky. There is oriental tobacco. Those are the three major types. Some consumers prefer a cigarette that's all flue-cured tobacco. It's got a different character than an oriental tobacco or burley tobacco.

Q And those are known as English or Virginia cigarettes?

A Well, I guess I know them more as either all flue-cured or all Virginia cigarettes as opposed to English.

Q They don't have any of these flavors?

A Well, they can. But they typically don't incorporate as many ingredients as a blend, what we call a blended cigarette. Namely, the U.S. style cigarette has a blend of

various tobaccos. It usually includes flue-cured, burley and oriental, so it's a blend; whereas the English cigarettes are typically just a straight flue-cured cigarette, and they typically don't have as many ingredients.

Q Dr. Appleton, has the presence of substances considered to be carcinogens in cigarette

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smoke been a matter of public scientific knowledge or knowledge that can be obtained from published sources?

A Yes, absolutely.

Q Over what period of time?

A I don't know if I can give an exact estimate, but I know for at least 50, 60, 70 years people have been analyzing cigarette smoke and identifying various substances that they feel may be relevant to smoking and disease.

Q How are those types of analyses carried out in general terms?

A Typically what happens is one has a smoking apparatus that will smoke a cigarette, a machine, and if you picture -- may I borrow your pen, please? Let's say this is a

cigarette and this is the filter end. What you do is have a machine suck the smoke into a filter pad, which would be depicted by my hand. It's a filter pad. The smoke particles are then captured onto the pad. Then you can take a solvent, dissolve that material off, and then you can analyze that material to see what's in it.

There's also -- that would be substances in what's called the particulate phase of the smoke particles. There's also a vapor phase where substances appear in gases, and they can be collected also in like a bag that might be behind the filter, and that can be collected and analyzed to see what's in the gas phase.

Q Is that technique, I know it's not simple, but is that more or less straightforward analytical chemistry?

A Yes.

Q And tell us, Dr. Appleton, what the Tobacco Chemists Research Conference is.

A The Tobacco Chemists Research Conference is a meeting that's held every year and it is attended by people who have a specific

interest in tobacco chemistry, which is largely people in the tobacco industry but also people in various, like U.S.D.A., U.S. Department of Agriculture, people in health-related areas, like the American Health Foundation.

And every year, just like I attend the Society of Toxicology meeting, as a toxicologist, people whose primary discipline is tobacco chemistry attend this meeting, and they present their research findings on tobacco chemistry and smoke chemistry, and these proceedings are publicly available.

Q What do you mean by tobacco chemistry or smoke chemistry?

A Well, what -- determining what it is that

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tobacco is made out of. If you analyze it and try to determine what its composition is, that sort of thing. Or if you analyze what's in smoke, and what its made out of, or there's a lot of work being done, or has been done for decades, trying to determine what the major items are in tobacco that give rise to the smoke constituents, to try

to understand if you've got something in smoke, where does it come from, what is the precursor to it when it's burned. There's quite a lot of understanding about that.

Q And what role does that organization play in contributing to science's understanding of those issues?

A I think it plays a large role. For decades the tobacco industry, as well as others, the outside scientific community, have been conducting research into tobacco and smoke chemistry and try to understand what the relationship is and they've been publishing their findings. It's been made available to the scientific community.

Q Do you know what the Tobacco Manufacturers Standing Committee is?

A I believe that that is either the precursor to the Council for Tobacco Research or its counterpart in the U.K. But right offhand, I don't.

Q Dr. Appleton, do people, smokers or nonsmokers, encounter carcinogens in various aspects of their life?

A Well, yes. We all do.

Q From what sources?

A Well, from any number of sources. Starting with our diet, there are a number of substances in our natural diet which, under the conditions of these toxicological tests that I mentioned, have produced cancer in animals.

One example is a substance called allyl isothiocyanate. That's the material that occurs naturally in Brussels sprouts and cabbage and broccoli and horseradish. In fact, if you eat a big chunk of horseradish, you'll notice you get a pungent burst, a really intense feeling. That's from allyl isothiocyanate. That's been tested in animal studies and shown to produce cancer in animals. But that doesn't mean that eating those things is going to cause cancer in humans. In fact, there are also studies that suggest consumption of those types of vegetables actually might be protective for cancer.

There's also been studies that have looked at essential nutrients like selenium and magnesium and shown these to cause

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cancer under high dose conditions. But again, that doesn't mean that our -- that the presence of these things in our normal diet will, in fact, cause cancer.

I indicated earlier that cooking of food creates a number of substances that have been looked at, and in tobacco chemistry, the substance that's probably received the most attention and focus as far as having potential relevance to human disease is a substance called benzo(a)pyrene or BaP for short. This does occur in tobacco smoke at very small levels, but it also occurs in our diet, and it occurs in water.

In fact, the Environmental Protection Agency actually has a standard for an acceptable level of benzo(a)pyrene in water. It occurs in apples and salad. And, you know, I have made estimates, for example, that if a hamburger contains over a hundred times more, you get more -- a hundred times more benzo(a)pyrene from eating a hamburger than you'd get from being in a room for eight hours a day where there's

environmental tobacco smoke present.

Q Well, is there a difference between breathing something suspected of being a carcinogen as opposed to eating it?

A There can be. In the case of benzo(a)pyrene, however, I don't think there are any inhalation studies that have been conducted on it. And it seems that the route of administration doesn't really matter.

Benzo(a)pyrene has been given by the diet, it's been given by injection and other substances that are thought to have relevance to tobacco and health, such as nitrosamines. They seem to have their effect on the target organ regardless of what the route of administration is.

Q Explain that for me, in a little more simple terms.

A Well, for example, benzo(a)pyrene has been shown to at very high dose produce lung cancer in animals, even if you feed it. It doesn't have to be given by inhalation. But it does have to be given at very, very high doses to have this effect.

This is also the case with a number of other substances. In some cases the route of administration; namely, if you give it by inhalation or if you give it in a diet, does matter; but for benzo(a)pyrene it doesn't seem to.

So to the extent that benzo(a)pyrene may contribute to disease, at least the

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animal studies suggest that it may do that regardless of how you get it, what the route of administration is. If you either breathe it in from air pollution, because it is a component of vehicle exhaust; or if you eat it in your diet, like from eating a hamburger or an apple, or in your drinking water, it doesn't really seem to matter. At least the animal studies don't seem to bear that out.

Q Does the body produce -- strike that.

Are there any other ways to expose oneself to carcinogens?

A Well, there's a variety of substances in the air that arise from any number of sources such as vehicle exhaust. There are a number of contaminants in water. And these are all

present at trace levels. I don't want to give you the impression that, you know, we're being exposed to tons of chemicals. Well, actually we are, but at very low levels.

There are a number of natural substances in our diet. And our body does produce a lot of so-called natural carcinogens. One of the biggest sources of exposure to natural carcinogens is what's called free radicals or oxidation products. And you may have heard about antioxidants and why they're good for you. This is what this is all about, is our body, through our normal metabolic processes for dealing with food and breaking down food so we can obtain energy from it, creates oxidation products called free radicals. And those are thought to play a prominent role in cancer. But that's been happening, you know, in our biology for millions of years, and the body has all kinds of ways of dealing with it and protecting against that.

Q Dr. Appleton, how do the amount of carcinogens present in cigarette smoke or

environmental tobacco smoke compare to the amount of -- or compare to the same types of substances that one might encounter in other aspects of his or her life?

A Well, environmental tobacco smoke and cigarette smoke are quite different because the levels are different. Focusing on environmental tobacco smoke, I've made a number of estimates looking at actual research where measurements are taken in rooms where people spoke and where they've looked at the substances that are thought to be most important, such as benzo(a)pyrene or N-nitrosodimethylamine and other nitrosamines or just total particulate matter.

And from the estimates that I've made,

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and some of these come from actual measurements that have been made in hospitals, the levels that one might be exposed to during a typical eight-hour day are well within the ranges that regulatory agencies have promulgated as being acceptable exposure levels either for total particulate matter, for benzo(a)pyrene, or

for N-nitrosodimethylamine, for example. The levels are extremely low. They're thousands of times lower than levels that produce any types of effects in animals. They're well within, as I said, exposure standards for these substances that regulatory agencies have promulgated. And they're well below what's called no adverse effects levels, which is the levels that are considered to be below -- so low that they are unlikely to produce any adverse effects.

Q What do you mean by total particulate matter?

A Total particulate matter is, there's particles in the area that we breathe in any environment that we're in, even if you're in what you feel is a pristine environment. You can draw air through a filter and collect particles in the air against that filter. That's probably one of the most common measures of air pollution that's done.

And that's also a measure for measuring what the contribution of environmental tobacco smoke might be to an environment.

And there have been many, many studies that have looked at the amounts of total particulate matter in the air.

In the outdoor air, the main sources of total particulate matter are burning activity, such as wood burning and leaf burning, and vehicle exhaust. But there's a number of other activities that contribute to total particulate matter. In fact, the Environmental Protection Agency has recently set a new standard for total particulate matter. You may have heard about it in the news. The press bid was that your barbecue was going to be banned because it is going to emit higher levels than would be permitted by the EPA.

In any case, I've looked at that exposure standard and compared the exposure that one might get being 24 hours in an environment that contains this particulate matter. And, again, these sources are very similar to what you might find with ETS.

They are sources that are from combustion, burning activities, from vehicle exhaust, from volatile organic substances

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that might be emitted from carpets or curtains or paint or things like that, and compare that to what the levels that one might get in all kinds of environments, including hospital. Because there are some studies on that. And also like a bar or restaurant. And the exposure that one gets would be well within what's considered to be an acceptable exposure level for total particulate matter as determined by the Environmental Protection Agency.

Q Now, Dr. Appleton, we've heard about epidemiology studies that indicate that people who smoke develop lung cancer more often than people who don't smoke.

A Yes.

Q Are you familiar with those?

A Yes.

Q And there are, as you defined them or described them, carcinogens present in mainstream cigarette smoke.

A Yes.

Q Does the fact that there are carcinogens present in mainstream cigarette smoke compel the conclusion that smoking causes cancer?

A Well, not as they occur in smoke, because in smoke the levels are so low that it doesn't automatically draw one to conclude that smoking is a cause of cancer. Because you find the same substances at about the same levels in a number of other things in our environment. And you would have to conclude those things are the causes of cancer as well if you did that. I mean, generally the things that are considered important in cigarette smoke are present at very, very low levels.

Q Are the same number of compounds present in environmental tobacco smoke?

A Well, they haven't all been measured. One of the problems is that the presence of constituents in environmental tobacco smoke is so low that for most of these things, they simply can't be detected analytically. Some of them have. Some of the ones that are thought to be most important or most relevant, like benzo(a)pyrene or NNK or N-nitrosodimethylamine, total particulate matter, nicotine, carbon monoxide, these sorts of things have been measured in

environmental tobacco smoke.

Q And how do the levels in environmental tobacco smoke compare to the levels in mainstream smoke?

A Much, much lower. I mean, I've done calculations of -- it depends on what your assumptions are, but basically the dilution of these substances in a room like this is

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about a million times less than what occurs in active smoke or active mainstream smoke.

Q Dr. Appleton, are you generally familiar with product modifications that can be employed to reduce these substances in smoke?

A Well, yes, I'm familiar with the research that's been done by our company at product modifications.

Q And is one of those modifications known as general reduction?

A Well, that's been the most consistent modification that we have employed. That's been the strategy for, I guess, a less hazardous cigarette that's been encouraged most consistently by the health authorities and the public community or the scientific

community.

Q What does it mean to generally reduce or general reduction?

A Well, the thought is that since no one really knows what it is in from cigarette smoke that may be responsible for disease, it would be nice if we did know it, because then we could say, okay, we'll just simply remove that and we will have resolved the issue. But unfortunately, we don't know. So the thought is that the most prudent way to go is just bring down the levels everything, and general reductions basically refers to reducing total delivery. That's achieved primarily through putting on a filter and through ventilating the filter.

Q What is selective reduction?

A Selective reduction would be if you have a particular chemical in smoke that you're going to try to reduce its level or a particular class of substances such as aldehydes, or acids or something like that; if you want to try to selectively eliminate or reduce the concentrations of a particular substance or class of substances, that would

be selective reduction.

Q And how widespread is that or how successful is that technique?

A Well, that's been looked at as a strategy for making what one might feel is a safer cigarette, but that has complications as virtually all the strategies that we've researched and that we've tried to employ. It's not completely straightforward. It can be done for some substances, but it results in some dilemmas, frankly, where you're not really sure if you've made a positive change in the product.

Q What about tobacco substitutes? Have you explored the possibility of using something other than tobacco?

A Yes, we've researched that, and we continue

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to research that. And the concept there is to make something that can be put into tobacco that itself is inert, but it will dilute the tobacco so that when you burn the cigarette, in essence, you'll be diluting the constituents of smoke. And there have been various attempts to develop synthetic tobaccos or substitutes that can be

incorporated into the blend to dilute or reduce the total concentration of constituents in smoke.

But that again has certain issues and problems with it that make it a difficult strategy to try to employ in making a safer cigarette.

Q We heard a little bit yesterday about using less tobacco through a variety of techniques including reduced circumference cigarettes.

A Yes.

Q What is a reduced circumference cigarette?

A Well, I mean, the most simplistic way to explain it is a skinny cigarette, a thin cigarette. And because the cigarette is slimmer and skinnier, it has less tobacco; and since it has less tobacco, it will generate less smoke and also less environmental tobacco smoke.

Q And does Brown & Williamson make a skinny cigarette, for lack of a better word?

A Yes, we have a product that's the slimmest cigarette on the market. It's called Capri.

Q And what about heating tobacco instead of burning it?

A Well, heating rather than burning is also among the strategies that we've researched over the years. In fact, it was one of the first strategies that we employed around 1964 in trying to develop a safer cigarette. And the concept there is that rather than burning the tobacco and creating these combustion products which may be responsible for the association between smoking and disease, you can simply heat the tobacco and volatilize off some flavors and that might be sufficient for a smoker.

The problem with that was -- there were a number of problems with that approach, but the biggest problem we ran into was consumer acceptability. People just don't like products like that.

Q Are you currently considering those types of products?

A Yes, we are. We're looking at a number of strategies still.

Q Dr. Appleton, do you know or did you know a Brown & Williamson employee named Jeffrey Wigand?

A Yes.

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Q Did you work with Dr. Wigand?
A Yes, he was my boss.
Q At the time -- at the time he came to Brown & Williamson, were efforts already underway to develop cigarettes that heated rather than burned tobacco?
A Yes.
Q And did those efforts continue while he was at Brown & Williamson?
A Yes.
Q Did those efforts continue after he left Brown & Williamson?
A Yes.
Q Do you recall him specifically being involved in the study of those types of products?
A I don't recall him. If he was, I wasn't aware of it.
Q Did you ever recall him talking with you about those types of products?
A No.
Q Are you familiar with a project known as project Airbus?
A Yes.
Q What was project Airbus?

A Airbus was -- again, a project designed to develop what hopefully would be a safer cigarette. The main technology and strategy employed there was a heat rather than burn technology.
Q And was that a project that began before Mr. Wigand went to the company?
A Well, yeah. We had been looking at heat rather than burn technology since, as I said, since 1964 so it's -- it, you know, has extended into various forms and fashions over the years, but that certainly had been researched and was being researched well before then.
Q Has it continued after his departure from the company?
A Yes. In some form or fashion, yes.
Q Dr. Appleton, what is moist snuff?
A Moist snuff is a form of chewing tobacco. It's -- well, if you know what Copenhagen is, that's moist snuff. It's moist tobacco, that the way it's taken, you take a pinch and put it in your mouth.
Q Has Brown & Williamson ever developed and sold a moist snuff product?

A We've attempted to develop a moist snuff product. We never were successful commercially.
Q And did that occur while you were at Brown & Williamson?
A Yeah.
Q Did anyone ever tell you that the purpose of developing a moist snuff product was to,

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"hook" nonsmokers?
A No. My understanding is that the goal of the project was to compete with Copenhagen.
Q Does Brown & Williamson employ lawyers at its offices?
A Yes.
Q For what purpose?
A Well, for, you know, any number of things that you can imagine. Normal business activities. But we have literally hundreds of lawsuits pending against us right now, so a large part of the lawyer staff is involved with litigation.
Q What other -- what about other activities, like regulation?
A Oh, sure. Like any company, we have regulatory issues that we have to deal with,

we've got employee and union issues, we've got financial and accounting issues, we have contracts that we implement with various contractors, and that requires legal input. All of these -- anything that you can imagine that you'd need lawyers for, of course, we have lawyers.
Q Patents?
A Pardon?
Q Patents?
A Patents, yes, of course.
Q During the time you've been at Brown & Williamson, has any lawyer ever restricted your access to data or to other scientific information?
A No.
Q Do lawyers look over your shoulder while you do your job?
A No.
Q I mean that either literally or figuratively.
A No.
Q All right. Dr. Appleton, thank you very much.
MR. OHLEMEYER: That's all I have,

Your Honor.
THE COURT: Thank you, Counselor.
Mr. Motley.
MR. MOTLEY: Good morning, ladies and gentlemen. Your Honor.

CROSS-EXAMINATION

BY MR. MOTLEY:
Q Dr. Appleton, my name is Ron Motley. I've never met you.
How are you doing, sir?
A Good.
Q Dr. Appleton, you not only work with Brown & Williamson, but you were also at RJ Reynolds at one time; right?
A Yes.
Q What did you do for them?
A I primarily reviewed ingredients for

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regulatory status and for acceptability.
Q Okay. Are you familiar with Dr. Porter?
A No.
Q Have you studied anything that he's written on cigarette and disease?
A Not that I recall.
Q What about Dr. Bennett?
A Bennett?

Q Bennett, pathologist. Every heard of him in the cigarette literature?
A Vaguely, but I don't really recall.
Q Have you ever read anything he's written?
A I may have. I just don't recall.
Q Dr. Thomas Bennett?
A The name is familiar, but I'm not sure why. I don't really recall.
Q Well, if he testified he had never written anything on cigarettes and disease, would you have any --
MR. OHLEMEYER: It's argumentative, Your Honor.
MR. MOTLEY: It's not argumentative, Your Honor.
THE COURT: Let's hear your question.
Q If Dr. Bennett testified here in this trial, and his curriculum vitae is in evidence, that he's never written anything about cigarette and disease, then you must have a different Bennett in mind?
A I must have.
Q Now, Dr. Appleton, you mentioned hamburgers. Does hamburgers cause 160,000 cases of lung

cancer in the United States?
A Well, I don't know.
Q You think hamburgers cause 160,000?
A I haven't finished my answer, sir.
Q Go ahead.
A Dietary fat is, in fact, associated with lung cancer. There are epidemiological studies that link dietary fat to lung cancer and also red meat is linked to colon cancer.
Q I didn't ask you about colon cancer.
A You said deaths.
Q I said lung cancer.
A Okay.
Q I want you to tell this jury, look them in the eye and tell them that Brown & Williamson's position at R & D is that hamburgers cause 160,000 lung cancer deaths every year?
MR. OHLEMEYER: Objection, Your Honor. It's argumentative.
MR. MOTLEY: No, it's not.
THE COURT: Rephrase your question.
Q Do you find something amusing about lung cancer, sir?
A No.

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Q Okay.
A I'm reacting to -- I think you're saying something that I didn't say.
Q Let's read back what you said then.
MR. MOTLEY: Ma'am, can you do that?
(The requested material was read by the reporter.)
Q I don't want to talk about colon cancer. I'm asking you, sir, can you look this jury in the eye and tell them that hamburger causes 160,000 deaths from lung cancer every year in the United States?
A No. There's no way I could say hamburgers cause 160,000 deaths of lung cancer a year.
Q Well, the testimony has been, sir, in this case, I ask you to assume, that upwards of 400,000 deaths occur in the United States from smoking cigarettes. I want to ask you, with Brown & Williamson, does Brown & Williamson admit that a single American citizen dies in the United States from smoking cigarettes?
A They very well may.
Q How many?

A I have no way of knowing.
Q Well, how many people you got at R & D?
A Approximately 140, between 140 and 150 at any one time.
Q Well, has Brown & Williamson ever tried to find out how many Americans die from smoking cigarettes?
A Sir, we study the role of smoking and health continuously. We have an ongoing research program to look at that, and I, myself, review the literature and am aware of what the literature says.
Q Well, will Brown & Williamson today admit in a court of law that cigarette smoking has caused the death of a single American?
MR. WAGNER: Asked and answered, Your Honor.
MR. MOTLEY: No, sir. I didn't use that exact question. I changed the word to "cause."
THE COURT: You may answer.
A I said it very well may.
Q Well, will you admit that it does?
MR. WAGNER: Asked and answered, Your Honor.

THE COURT: I think he's answered it now.
Q Well, how many then?
A I have no way of knowing.
Q You've got 140 men and women working for you in R & D and you don't have a clue as to how many people die from smoking cigarettes every year; is that correct?

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MR. OHLEMEYER: Objection.
MR. WAGNER: Asked and answered. It's argumentative, Your Honor.
MR. OHLEMEYER: Argumentative.
THE COURT: Sustained.

Q Now, sir, British American Tobacco Company is a company known to you; correct?
A It's a company, what? I'm sorry, I didn't hear your question.
Q You know what BATCO is, don't you?
A Yes.
Q Tell the jury what BATCO is.
A BATCO is a sister company to Brown & Williamson. There are several sister companies under BAT. That's one of them.
Q Now, what is BAT that BATCO is a sister company? I guess B&W and BATCO are sisters;

right?
A Yes.
Q Who is the parent?
A Well, I'm not an expert at all on the organization, but my understanding is that BAT is a holding company that has various interests, and that that includes BATCO and B&W and other companies.
Q And British American Tobacco Company is headquartered in what country, sir?
A United Kingdom.
Q And BATCO is where?
A Well, BAT is in London, and BATCO is in Staines.
Q In where?
A Staines.
Q How do you spell that?
A S-T-A-I-N-E-S.
Q Spell it just like it sounds then.
A Uh-hum.
Q And Brown & Williamson is headquartered in Louisville, Kentucky; right?
A Yes.
Q Correct?
A Yes.

Q Now, you have ongoing company relations with BATCO in the United Kingdom and British American Tobacco Company, don't you?
A I have almost no interaction with BAT, but I do interact with various parts of BATCO on a regular basis, yes.
Q So you have regular-basis contact with BATCO.
A Yes.
Q And do you go to London from time to time?
A Yes.
Q Well, what's the most recent time you've been there?
A Oh, about two weeks ago.
Q Two weeks ago. And do you communicate with BATCO scientists frequently?
A Yes.

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Q And what was the Froggatt; is it Froggatt Commission?
A Froggatt Committee?
Q Yes. Tell them what that is.
A That's a committee, and I'm not sure exactly what the organization is. It's a government committee that was commissioned to oversee various aspects of health-related matters

insofar as cigarettes is concerned.
Among the things they looked at was assessing product modifications, many of which were intended to be resulting in a safer cigarette. But they also issued reports about smoking and health matters, and they also issued guidelines for assessing ingredients and additives and alternative cigarette designs that might be implemented to achieve a safe cigarette.
Q And part of your job, I believe you told us, at Brown & Williamson is to know what's going on on smoking and health issues, isn't it?
A Yes.
Q And I take it you pride yourself in being up to speed on that, don't you?
A Well, as much as I can. It's a very large area. It's hard for me to know everything.
Q Oh, I'm not suggesting you know everything, but you do your level best to keep abreast of at least major events, don't you?
A Yes. Yes.
Q And so you know about the Froggatt Committee, right?

A Yes.
Q And you know about the Hunter Committee?
A Yes.
Q And do you -- just give us some idea how frequently. Do you talk with your British colleagues at BATCO weekly?
A Yes.
Q And who do you normally deal with there?
A Normally the people involved in ingredient assessment just like myself.
Q And do you have a name for us?
A Well, probably one of the people I frequently talk to is Graham Smith.
Q Graham Smith. And what's his job, sir?
A It's similar to mine which is to assess and evaluate the acceptability of ingredients and materials used in the manufacture of cigarettes.
Q In the U.K., are you aware that there's something -- I'm talking fast to try to hurry things up here.
A I appreciate that.
Q The Tobacco Manufacturers Association, tell the jury what that is.
A In the U.K.?

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Q Yes.
A Well, I assume it's -- I don't know that much about the Tobacco Manufacturers Association.
Q Just tell us what you know.
A All I can assume is it's a trade association that represents the tobacco manufacturers.
Q Including BATCO?
A I don't know if they're a member or not.
Q Well, they're in the U.K., aren't they?
A Yes, but that doesn't mean they're a member.
Q Okay. Do you not know that they're a member?
A I don't know if they are or are not.
Q All right. Well, sir, let me ask you, sir, to look at --
A Okay.
Q Doctor, are you familiar with the Department of Health and Social Services?
A Somewhat.
Q Yes, sir. And you know that there's an oversight committee that's been looking into cigarette smoking in Great Britain; correct?
A Yes.
Q And are you aware that this report was

issued this week?
A No. I can't see a date on it. Oh, here it is. February 5, 1998. No, it wasn't issued this week.
Q Well, are you aware of its findings about passive smoking or secondhand smoking?
A In this report?
Q Yes.
A No.
Q So nobody from British -- did you tell your colleagues at British American Tobacco Company that you might be here today in Muncie, Indiana, testifying in a secondhand smoke case?
A Some of them are aware of it. I've been here all week.
Q You've been here all week. Well, did any of them try to contact you since you were going to be here testifying in a secondhand smoke case and tell you that the British government, their version of the Surgeon General, had just issued a comprehensive report on secondhand smoke?
A No.
Q Let me ask you if you agree or disagree with

the findings.
MR. WAGNER: Objection.
MR. OHLEMEYER: Objection, Your Honor.
MR. MOTLEY: Your Honor, he's here as a corporate representative. His job is to be apprised of what's going on in smoking and health matters.

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THE COURT: Go ahead.
MR. WAGNER: Just for the record, may I have an objection about questioning the witness about a hearsay document?
THE COURT: All right.
MR. OHLEMEYER: May we approach for a moment, Your Honor?
THE COURT: All right.
(Bench discussion)

Q Doctor, would you kindly look at page 6.
A You took the document. Somebody took it from me.
Q Same report.
A Did you want me to focus on a particular section?
Q Let's look -- it says "Key Messages".
MR. MOTLEY: Your Honor, I have

reproduced this.
Q Could you confirm, Doctor, that this is that page?
A Well, without reading it for word for word, I'll assume that it is.
Q Looks like it, don't it?
A Well, that has a lot more on it. Looks like you've gone into page 2 here.
MR. MOTLEY: What page is this from?
A That's a combination.
Q That's page 1 and 2?
A Yes.
Q Okay.
A Well, 6 and 7, actually.
MR. MOTLEY: Your Honor, would you ask if the jury wants this closer or if they can see this.
THE COURT: Can you see that where it is, in the background? A little closer. All right.
MR. OHLEMEYER: Your Honor, I'm confused of the procedure at this point. I thought you had allowed him to question over objection. I didn't know, has he offered

any of this?
THE COURT: This is not in evidence yet, ladies and gentlemen.
MR. OHLEMEYER: Well, I have an objection. You've overruled to the questioning, but I have an objection to the publication then of the document.
THE COURT: Right now I'm considering this as demonstrative right now.
MR. MOTLEY: 8036. Yes, it is right now.
Q Doctor, look at "Key Messages" on page 6, would you, please.
A Yes.
Q It talks about active smoking, that its responsible for 100 -- causes. They use the word "cause." Do you see that?

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A Yes.
Q Cause. It causes 120,000 deaths a year in the United Kingdom. Do you see?
A Yes.
Q That's active smoking, all right?
A Right.
Q It says that half of -- on the second paragraph, "Of those who continue to smoke

cigarettes are eventually killed by the habit." Do you see that?
A Yes.
Q You would agree that that's a pretty serious statistic.
A Yeah.
Q Half of the people that continue to smoke are going to die as a result of it; that's pretty serious, isn't it?
A Yes.
Q "The enormous," the third paragraph, "damage to health and the large number of deaths caused by smoking should no longer be accepted. The government should take effective action to limit this preventable epidemic."
"Epidemic" is a strong word, isn't it?
A Yes, it is.
Q It says, "The government should require the tobacco industry," that would BATCO if they're in the U.K.; right?
A Yes, but I'm not sure if BATCO actually sells cigarettes in the U.K.
Q But they're located there; right?
A Yes, but I don't believe they sell

cigarettes there.
Q Let me ask you this: Brown & Williamson bought another cigarette company, didn't they?
A Yes.
Q Called what?
A American Tobacco.
Q Who owns what?
A Pardon?
Q And do they own a British company? Gallaher's?
A I'm not really familiar with the relationship. I can't speak knowledgeably on it.
Q Have you ever heard Gallaher's name?
A Yes.
Q They're in Great Britain, aren't they?
A Yes.
Q "The government should require the tobacco industry a normal standard of exposure and the recognition of the evidence that smoking is a major cause of premature death."
Sir, can you tell us today if Brown & Williamson today, will they admit that smoking is a major cause of premature death?

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MR. WAGNER: Asked and answered, Your Honor. Same question as before.
MR. MOTLEY: No, it's not. It's a different one.
THE COURT: You may answer.
A Well, it is the same answer. It very well may be.
Q No, sir, they don't say that the cigarette companies say it may be. But that they recognize the evidence that smoking is a major cause of premature death.
Do you, sir, recognize cigarette smoking is a major cause of premature death?
MR. WAGNER: Asked and answered, Your Honor.
THE COURT: You may answer.
A Well, looking at it from a public health perspective, they're relying extensively, if not primarily, on epidemiology. And certainly the epidemiological evidence suggests that that is the case.
And if I step into the shoes of a public health authority and look at the epidemiological evidence, I would come to the exact same conclusion and, in fact,

assume that smoking is a cause of disease. Now --
Q So I take it --
A I'm not finished with my answer, sir.
Now if I step out of the public health shoes and step into the shoes of a cigarette manufacturer, we look at this from the perspective of we've got a product that people are saying are causing 400,000 deaths a year; what do we have to do to fix it. And what -- what alternatives do we have to make or cigarette design changes do we have to make. Then when we make those design changes, how do we know the product is safer.
When I apply the criteria that I have to apply to that, that I feel are appropriate, I use much more rigorous criteria. I don't just rely on epidemiology. I rely on criteria of constituent toxicology, something about bioassays of smoking, the mechanism of disease.
In other words, what I'm saying is the criteria to declare something hazardous is

much easier than to declare something safe. When I apply these more rigorous criteria, there are gaps left in the information. But if I rely only on epidemiological evidence, I would come to the same conclusion myself.
Q So I take it that the answer to my question is yes, Brown & Williamson agrees that cigarette smoking is a major cause of

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premature death?
A No. My answer is, based on the epidemiological evidence, that appears to be the case. But if I look at other sources of evidence, it doesn't -- it doesn't compel me to conclude that. It depends upon how you're looking at it.
Q So your answer is maybe?
A It may be. I assume, based on epidemiology, that it may be the case.
Q How many cigarettes do you produce every day, sir, at Brown & Williamson with knowing that the epidemiology shows that it's a major cause of premature death to the tune of 400,000 a year? How many cigarettes are you making?
A I don't know what our production figures

are.
Q Half a million a day, do you think?
A Probably a lot more than that.
Q A lot more than that.
Now, "Passive smoking is a cause of lung cancer." Do you see that?
A Yes.
Q "And childhood respiratory disease. There is also evidence that passive smoking is a cause of ischemic," did I pronounce that right?
A Some people say ischemic, some say ischemic.
Q Well, I'm committing to ischemic. "Ischemic heart disease and cot death." What does that mean?
A In the U.K., that's SIDS, sudden infant death syndrome. That's what they call SIDS.
Q So a parent smoking is a cause of sudden infant death syndrome. That's what that says; right?
A That's what this document says, yes.
Q Parents need to be informed about the effects of passive smoking on their children. Do you see that?
A Yes.

Q Do you agree with that?
A Agree with what? There's a lot of statements in there.
Q You agree that parents need to be informed about the effects of passive smoking on their children?
A I think people ought to be informed about any health risks. I think people ought to be concerned about their health. But if you're asking me do I think that environmental tobacco smoke causes --
Q I didn't ask you that?
A -- lung cancer.
Q Didn't you hear what I asked you? I asked you: Do you agree that parents need to be informed about the effects of passive smoking on their children, yes or no?

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A I think everyone should be informed about any potential hazard that they may encounter.
Q Now, can you tell me what bulletin Brown & Williamson has put out in the last year and a half to inform parents about the effects of passive smoking on their children? It's zero, isn't it?

A Well, in my view, when I look at the evidence, I don't think the evidence is sufficient to draw that conclusion.
Q Well, I didn't ask you that. You said you think people ought to be informed. I asked you if Brown & Williamson has done anything to inform parents about the effects of passive smoking on their children.
A But we're not convinced that, in fact, environmental tobacco smoke does that.
Q You don't agree with Geoffrey Bible, the chairman of the board of Philip Morris, who testified in this trial that passive smoking aggravates childhood asthma, you don't agree with that?
MR. OHLEMEYER: Objection, Your Honor. Argumentative. Asking him to comment on another witness' testimony.
THE COURT: Overruled. He can answer that.
Q You can answer.
A I think it's possible that it may, but the evidence I've seen isn't compelling, and it isn't conclusive.
Q Meanwhile then you continue manufacturing

over half a million cigarettes a year without telling parents that there's a possibility that if they smoke around their kids, it's going to hurt them?
MR. OHLEMEYER: Objection, asked and answered, argumentative.
THE COURT: Actually, I'm not sure he answered Mr. Motley's question about three questions ago about the bulletin.
Q You didn't put a bulletin -- you haven't put a bulletin out, have you?
A No, we haven't put a bulletin out.
Q So you continue to manufacture over a half million cigarettes a day knowing there's a possibility that little kids could be hurt by their parents smoking and you just remain silent?
MR. OHLEMEYER: That's argumentative.
THE COURT: That's sustained. You don't have to answer that.
Q Then they conclude that nicotine is addictive, don't they?
A I didn't get to that section yet.
Q Nicotine addiction. No. 3.

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A Right. I'm still reading.
Yes, it essentially concludes that nicotine is addictive.
Q So does the Food and Drug Administration of the United States Government; correct?
A Yes.
Q And tell the ladies and gentlemen of the jury as you sit here today, is Brown & Williamson ready to admit that nicotine is a drug that's addictive to people who smoke?
MR. WAGNER: Argumentative, Your Honor.
THE COURT: Overruled.
A Well, where you come out --
Q Answer my question first.
A It depend upon which definition you use for addiction.
Q Okay. So you say -- you will admit that it's addictive if the definition is correct; right?
A If you apply a certain definition, you could include in that definition, yes.
Q Okay. Now, are you aware that this document says it's the addition, the addictive nature of cigarettes that's causing the epidemic of

death and disease in the United Kingdom?
A Yes, that's what it says.
Q Okay. Do you see under price and advertising, sir, I want you to focus only on advertising and the sentence that begins "These counteract public health messages."
MR. OHLEMEYER: Objection, Your Honor. It's beyond the scope of direct examination.
MR. MOTLEY: Your Honor, he's a representative --
THE COURT: Overruled.
A Now, I'm sorry, the question you wanted me, or the sentence you wanted me to focus on?
Q It talks about advertising and promotion, "These counteract public health messages, undermine a proper understanding of the real size of the hazard and promote the social acceptability of cigarette smoking. In view of the burden of disease and death caused by tobacco, there can no longer be any justification for the deliberate promotion of this habit, which is the most important cause of cancer in the world."
Do you see that, sir?

A Yes.
Q How much money does Brown & Williamson spend on promotion and advertising of cigarettes in the United States every year?
A I don't know.
Q Well, is it a billion dollars, maybe?
A I really don't know. I'm not involved in marketing at all.

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Q You don't see anything in this document about hamburgers being an important cause of cancer, do you?
MR. WAGNER: Objection, Your Honor. Argumentative.
THE COURT: Sustained.
Q Dr. Appleton, you testified about cigarette design, Brown & Williamson makes a low-tar cigarette, don't they?
A We have several.
Q What's the lowest tar cigarette you make?
A Carlton.
Q Carlton? You make a full-flavored cigarette?
A Yes.
Q What's it called?
A Well, there's more than one, but one of our

brands is Kool.
Q What's another one; Raleigh?
A Raleigh. Viceroy.
Q Now, Carlton has approximately how many milligrams of tar, sir?
A Well, there's different types, but --
Q The lowest one?
A One of the lowest would probably be one milligram.
Q Raleigh, Viceroy have how many milligrams of tar, approximately?
A If they're full flavor, they're probably about 15 to 17.
Q So this one, Carlton, is -- my math, I'm not good at math. I've demonstrated I'm not good at math.
A Well, if it's only one, it's 15 to 17 times less.
Q 15 to 17 times less. Okay. Is this one safe?
A I don't know.
Q You don't know. Is this one safe?
A I don't know.
Q Is this one more dangerous than that one?
A I don't know.

Q Well, do you know a gentleman named Roach who worked at Brown & Williamson?
A No.
MR. MOTLEY: Excuse me one second, Doctor.
Your Honor, we move the admission of 34327 against Brown & Williamson produced from their files, right there on the side.
MR. OHLEMEYER: Lack of foundation, Your Honor, and hearsay.
MR. MOTLEY: It's not a hearsay document, Your Honor. It's produced by Brown & Williamson from their own files. It's an interview of a senior management official of the company.
MR. OHLEMEYER: Your Honor, as Mr. Motley knows, this is hearsay,

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regardless of where it comes from, and there's no foundation for its use with this witness.

MR. MOTLEY: Your Honor, he has testified -- can I do a foundation question first?

THE COURT: Go ahead.

BY MR. MOTLEY:

Q Dr. Appleton, isn't it true, sir, that you have reviewed thousands of internal corporate documents?

A I don't know the exact number, but I've reviewed a lot.

Q You've reviewed an awful lot of them, haven't you?

A Yes.

Q Indeed, lawyers for the company have had you review this book, the Cigarette Papers; right?

A I've reviewed a lot of things from a lot of sources. Lawyers gave me some of it, but some of it I obtained through other means, but I have read this book.

Q You have read this book. And lawyers have given you, literally, and I can show you your testimony in another case, thousands of internal Brown & Williamson and BATCO corporate documents; correct?

A I have seen thousands of documents.

Q All right. And do you see on that document, sir, it says produced --

MR. OHLEMEYER: Your Honor, I object to that. How it was produced isn't a

foundational question for this witness.

MR. MOTLEY: Well, if it was produced.

THE COURT: Well, it may be.

MR. OHLEMEYER: But Mr. Motley knows it's not, and I know it's not. It's not.

MR. MOTLEY: Mr. Motley knows contrary to what you know if that's what you know.

THE COURT: Let's hear your question.

BY MR. MOTLEY:

Q Now, you know, you've looked at thousands of documents. You're familiar with Brown & Williamson's paging system, aren't you?

A Well, no. I'm familiar that there's a numbering system, but I don't know what it means. But I see those numbers all the time on documents.

Q So you know you have a 1-, 2-, 3-, 4-, 5-, 6-, 7-, 8-, 9-digit numbering system, don't you?

A Well, frankly, I never counted the digits. I just know that those numbers appear on

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documents.
Q And would you tell me what that says right there. Produced by who?
A State of Texas litigation, produced by B&W.
Q Is that your company?
A Yes.
Q All right. Do you have any reason to doubt that that came from your files?
MR. OHLEMEYER: I object to all of this, Your Honor.
THE COURT: Sustained to the last. You can ask him if he knows.
Q Well, do you know that your -- do you know whether or not your company produced that?
A No, I don't know.
Q You don't know. And all those thousands of documents that the lawyers gave you, they never gave you that one?
A I've never seen this one.
Q Do you know who Robert Roach was?
A No.
Q Well, here's a document that I know you know. You know this one, don't you? Probably know that one by memory.
MR. OHLEMEYER: Objection, Your

Honor. Move to strike.
THE COURT: Last will go out as to what he knows by memory.
A Yes, I believe I've seen this one.
Q Will you acknowledge, sir, that there's a nine-digit number?
A Yes.
Q Okay. Now, does that refresh your -- give you any help in identifying that that's a nine-digit number, and this is a nine-digit number, this was produced by Brown & Williamson and this says it was produced by Brown & Williamson, will you now concede that that's a Brown & Williamson document?
MR. OHLEMEYER: There's no debate, Your Honor, that it was produced by Brown & Williamson in a different lawsuit. That's not the issue for foundation with this witness.
MR. MOTLEY: Well, then, Your Honor, I'd reassert its submission at this time. It is from their files. It's a corporate -- maintained by the corporation, and I think I'm entitled to ask a witness about a statement made by an official of the

company at page 2, Mr. Roach, on public television.
MR. OHLEMEYER: Same objection, Your Honor.
THE COURT: There hasn't been any testimony who Mr. Roach may be, as I recollect.
MR. MOTLEY: Well, I can prove that

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up right now.
THE COURT: All right.
MR. MOTLEY: May I hand it to Your Honor?
THE COURT: Yes.
MR. MOTLEY: This is from Brown & Williamson's personnel, produced to us.
MR. OHLEMEYER: Still same objection, Your Honor, lack of foundation, hearsay with this witness.
THE COURT: In terms of foundation, the Court will consider this. Objection is noted and overruled. 34327 will be admitted.
(Plaintiffs' Exhibit(s) 34327 received in evidence.)
THE COURT: This is admitted,

ladies and gentlemen, only against Brown & Williamson Tobacco Corporation only.
BY MR. MOTLEY:
Q Now, Doctor, are you familiar with Wave TV?
A Wave?
Q Channel 3.
A I've vaguely heard of it, but not really.
Q And this is a transcript of Robert Roach, an official of Brown & Williamson, responding to the need for safer cigarettes. Do you see that at the top --
A Yes.
Q -- left corner?
A Yes.
Q Look over on --
MR. MOTLEY: It's the third page, but it's called page 2. It's the last page of the document, sir.
A The very last, the one that says page 3 on top?
Q Says page 2 on top.
A Oh, that's not the very last page.
Q Next to the last page, I'm sorry.
A Okay.
Q At the top line says "Robert H. Roach,

interviewed in his office." Page 2; do you see that?
A Yes.
Q "We don't think it's a question of safer cigarettes. We think all of our cigarettes are safe."
Do you see that?
A Yes.
Q Is that true?
A That wouldn't -- I wouldn't say that. I don't think I've got a basis to say that.
Q So you don't -- you don't sit here and tell the jury today that all Brown & Williamson cigarettes are safe, do you?
A Well, it seems that he's saying this in the context of whether or not there's a scientific link that can, through

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experimental evidence, link cigarettes to hazard. And that may be what he means. I don't really know what he means. I wouldn't make that statement in 1998.

Q Well, in 1977, that wasn't true, was it? You weren't making safe cigarettes in 1977, now, making dangerous ones in 1998, are you?

A I don't think we can make that sort of a

claim, or make that sort of a statement. No. The reason why I mentioned 1977 is that you're trying to judge a statement made 20 years ago in the context of today.

Q Well, was it true at the time it was made? In 1977, did Brown & Williamson makes safe cigarettes?

A In my opinion, we don't know whether or not the cigarettes were safe or not. He may have felt that, based on whatever his rationale are, that they were. I don't know what he was thinking because I don't know the full context and circumstances surrounding that statement.

Q Well, has Brown & Williamson engaged in a campaign, to your knowledge, of claiming cigarettes are safe?

A Not to my knowledge, no.

MR. MOTLEY: Your Honor, this document is already admitted, 284. I'm about to ask him about -- about to give the jury a copy. And I'm done with the other one.

THE COURT: You can pass that one down, ladies and gentlemen. 284 is admitted

previously.

Q Dr. Appleton, let me ask you a few questions. You know Kendrick Wells, don't you?

A Yes.

Q Tell the ladies and gentlemen of the jury who he is.

A He's an attorney with Brown & Williamson.

Q And you work closely with him?

A Not really. I mean, from time to time I do, but I wouldn't say closely.

Q And who was Mr. Earnest Pepples in 1981? Do you remember who he was?

A Well, I know his current position. I know at one point he was general counsel for B&W, but I don't know what the time frame was.

Q He was vice president, wasn't he, and general counsel?

A I believe so.

Q All right. Now, have you ever heard of something called the Committee of Counsel?

A Yes.

Q Tell the ladies and gentlemen of the jury what the Committee of Counsel is.

A Well, I can give my understanding, I've

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never --
Q Go ahead, that's fine.
A -- attended any meetings. My understanding is it's a committee of attorneys that represent various tobacco companies.
Q And you testified on direct about additives. Do you remember that?
A Yes.
Q All right. "The positions announced at the Committee of Counsel meeting on additives are as follows: RJ Reynolds, continue meetings with HHS."
That's Health and Human Services; correct?
A I'm sorry, I'm not -- I don't see.
Q First page, under Committee of Counsel meeting.
A Oh, I see. "The position announced at the Committee"?
Q Yes.
A Yes.
Q "Continue meetings with HHS at the industry's initiation and two or three meetings from now submit to HHS a list of commonly used casings and flavorings which

would include about 30 items."
Do you see that?
A Yes.
Q "Philip Morris, submit a list of about 50 items soon."
Now, why -- can you help us with this now? How many was on the list that finally got submitted?
A I don't know.
Q It was hundreds, wasn't it?
A The first list? I believe it was. Yes.
Q Hundreds; right?
A Yes.
Q Why do you reckon then RJ Reynolds don't want to turn over but 30?
MR. OHLEMEYER: Objection, Your Honor. It's argumentative.
THE COURT: Sustained.
A I'm not sure if that's --
THE COURT: You don't have to answer that.
Q Were you with Reynolds in '81?
A In '81? No.
Q "American, submit a list of the most heavily used casings and flavorings at any time.

"Lorillard, stall any disclosure by industry as long as possible. Industry should immediately appoint an independent panel of reputable toxicologists to review a list of as yet undetermined items.
"Liggett & Myers, stall disclosure and industry should immediately appoint one independent toxicologist to review a list."

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Sir, could you tell these ladies and gentlemen of the jury every additive, every chemical, that's added to a cigarette called Raleigh?

A No, I don't know them right offhand. I don't know all of the ingredients in Raleigh.

Q You don't know all the ingredients and what's your position at R & D? What's your title?

A Director of scientific and regulatory affairs.

Q And you don't know what's in Raleigh?

A I could readily look it up if I were back in my office, but I don't have it committed to memory, no.

Q Well, could we call Brown & Williamson if we

brought a phone in here right now and you get on the phone with somebody and, so we can know what's in Raleigh?

A I don't think we would want to give you that information. It's trade secret.

Q Turn to page 2, please, sir. "Disclosure and Industry Toxicologists."

You're a toxicologist; right?

A Yes.

Q "The following reasons support disclosure: There are no toxicological problems with the industry's additives. The judgment about most additives is uncertain."

What does that mean?

A I don't know.

Q "If the industry discloses now the problem will go away. Disclosure now will appease critics in the Congress who are attacking the industry on the basis of its refusal to disclose."

Down at the bottom it says, "The following reasons support the appointment of an independent panel of scientists."

Page 3. "No. 1, you avoid adverse legislation by allowing HHS to announce it

is meeting its requirements through industry self-policing.

"No. 2, avoid mandatory disclosure of all additives.

"No. 3, improve the public image of cigarettes through HHS endorsement of industry self-policing. Gain control of how additives issue will be handled even if self-policing is not sanctioned.

"The following reasons oppose an industry panel of toxicologists:

"No. 1, products liability litigation risk is increased because of the possibility that the industry-appointed panel might conclude that certain additives have problems."

Do you see that, sir, on page 3?

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A Yes.
Q "No. 2. Unnecessary because the problem will go away if the industry simply discloses some number of its additives."
Do you know Bob Northrip, sir?
A Yes.
Q Who is he?
A He's an attorney with Shook Hardy & Bacon.

Q An attorney with who?
A Shook Hardy & Bacon.
Q And how do you know him?
A I've had workings with him from time to time on occasion. I can't recall a specific.
Q Is he in the courtroom today, by any chance?
A I haven't really looked around.
Q Take a look.
A I don't --
MR. WAGNER: Objection, Your Honor, irrelevant.
A I don't see him.
MR. MOTLEY: No, sir. It's in this document, Your Honor.
MR. WAGNER: Well, it may be.
MR. MOTLEY: That's all right. It doesn't matter whether he's here or not, okay? I'll withdraw it.
BY MR. MOTLEY:
Q "The product liability litigation risk positions --" this is on page 3 in the middle of the page, ladies and gentlemen. "by Bob Northrip is based on the opinion that it would be more difficult to defend against adverse assessments of additives by

an industry panel than adverse assessments by HHS scientists.
"The assessment is the same, even if the HHS scientists concluded that a larger number of substances were dangerous. The Northrip position is that a better alternative would be company review and testing of additives.
"If company testing began to show adverse results pertaining to a particular additive, the company control would enable the company to terminate the research, remove the additive, and destroy the data."
Do you see that, sir?
A Yes.
Q In other words, if you tested Raleigh, and the company did the testing instead of the government, and you found you had something in it that caused problems, the Northrip position is, you stop the research; right? And that's what he says; right?
A That's what the document says. That's not what happened, but --
Q You stop the research, you take the additive out, and you destroy the data; right?

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A Are you asking me a question?
Q I'm asking you if that's what it says.
A You have read into the record correctly. This isn't what happens. As this document indicates, it's a think piece. It's a lawyer saying on the one hand we could do this, here's the pros and cons; on the other hand, we could do that. That doesn't mean any of this happened. And I can tell you a main concern of the industry about disclosure was that our trade secrets would be given up.
If I call up Coca-Cola today, they wouldn't give you the formula for Coke over the phone like the question you just asked me. That was our main concern, and what did happen is we did disclose the list of ingredients to the government and ultimately the public.
Q Did I ask you for the formula for Coca-Cola?
A No, but you asked me the formula for Raleigh.
Q I did not. I asked you if you could tell us what additives are in it.
A That's part of the formula.

Q Oh, that's part of the formula.
A Yes.
MR. WAGNER: Arguing with the witness, Your Honor. I object.
A Sir, this is a think piece.
THE COURT: Wait a minute, just answer the questions. Go ahead, Mr. Motley.
A Okay.
BY MR. MOTLEY:
Q So the lawyer for Brown & Williamson was thinking out loud on that piece of paper that one of the things --
A Yes.
Q -- we should consider is do research; if the results are bad, destroy the research. That's what he was thinking about; right?
A He weighed several options plus and minus and gave the advantages of, on one course of action versus another versus another. It's essentially thinking out loud. That doesn't mean any of it happened. In fact, it didn't happen.
Q I'm not asking you if it happened. I asked --
MR. OHLEMEYER: Your Honor, may I

ask Mr. Motley if he's going to ask the witness a question, if he would give him the courtesy of facing him when he asks the question.
MR. MOTLEY: I'm standing right here, Judge. I'd have to get in the box to get any closer.
THE COURT: I want to make sure the

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witness can hear you. Have you been able to hear the questions?

THE WITNESS: Yes.

THE COURT: All right.

MR. MOTLEY: May I proceed?

THE COURT: Go ahead, Mr. Motley.

BY MR. MOTLEY:

Q So a lawyer for Brown & Williamson is thinking out loud, in writing, that one of the things we ought to think about is we've been using substance X for 30 years, let's go test it. And if we find out that it's bad, let's take it out and don't let nobody know about it, and we'll shred the document?

MR. OHLEMEYER: Argumentative. Asked and answered.

THE COURT: I think that's been

asked and answered.

MR. WAGNER: Object to arguing with the witness.

Q Doctor, have you ever heard the term "smoking pistol"?

A Yes.

Q You ever heard of a document called a "Smoking Pistol Document"?

MR. OHLEMEYER: Your Honor, this is argument at this point.

MR. MOTLEY: Your Honor, I'm laying a foundation for something.

THE COURT: Sustained to the last.

MR. MOTLEY: Your Honor, we move the admission of Plaintiffs' Exhibit 473.

(Bench discussion)

Q Don't read anything into the record yet with this, Doctor, but I just want to ask you to take a look at it.

Do you know who Bill Shinn is?

A I've heard the name, but I really don't know who he is.

Q You've already told us who Mr. Pepples is. Who is Mr. McCarty?

A I don't know who he is, either.

Q You know what the Council for Tobacco Research is, don't you?

A Vaguely.

Q Well, you've seen this document before, haven't you?

A Well, I haven't had really a chance to look at it yet.

Q Well, take a look at it.

MR. MOTLEY: Your Honor, may I hand you this paper? It shows who Mr. McCarty is.

THE COURT: Yes.

A It looks familiar. I may have seen it.

Q That's one of the documents that you were given to look at in connection with the Minnesota litigation. Do you remember?

A I don't know if I was given this or not.

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Q Well, you remember it, don't you?
A Well, yeah, but I could remember it from a lot of different places.
Q Well, you've read it before?
A I think I have. But if I have, it's been a while.
Q Now, do you see at the bottom of the first page, sir?

A The very last paragraph?
Q Yes, sir. With reference to Dr. Hughes.
A I'm sorry, where?
Q The last paragraph of the first page. It has the 473 number at the bottom right.
A It says "you may"?
Q Yes, sir.
A Yes.
Q You see the name Dr. Hughes?
A Yes.
Q And who was Dr. Hughes, sir?
A I believe at one time he was head of R & D for Brown & Williamson.
Q And did you know him?
A No.
Q Did you know the name mentioned here, Dr. Bob, Robert Hocket?
A Yes. I've heard that name.
Q And who is he?
A I believe at one point he was the scientific director of the Council for Tobacco Research.
Q Doctor, you've reviewed this book, Cigarette Papers, at the request of lawyers for Brown & Williamson, haven't you?

A I reviewed it, but it wasn't at the request of lawyers for Brown & Williamson necessarily. I reviewed a lot of documents provided to me by various sources, including lawyers.
Q And you know that that document I'm asking you about is referenced in that book, don't you?
MR. OHLEMEYER: Your Honor, I object to this as having no relevance and this isn't foundation at this point.
MR. MOTLEY: I'm trying to get the document into evidence, Your Honor, and then --
THE COURT: I understand that.
MR. MOTLEY: I'm establishing that this man has seen this document before. He's even given testimony about this document before.
MR. OHLEMEYER: The fact that he has seen it doesn't establish a foundation for its admissibility. It's got to be -- my objection is it's not relevant, no foundation, it's beyond the scope of his direct examination.

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MR. MOTLEY: Well, Your Honor, I'm entitled under Rule 611, he's a party representative. I'm entitled to wide latitude here as a party. 611 says I can even ask you to let me take him as if he were here on direct for me.

THE COURT: You can ask him the last question about the book, Counselor.

BY MR. MOTLEY:

Q You have reviewed that book, haven't you?

A Yes.

Q And that document is cited in that book, isn't it?

A It may be. I'd have to double-check.

Q And it's also cited in something else you've looked at, that's the Journal of the American Medical Association, isn't it?

A It may be. It's been a while since I read those papers. I don't know if it is or isn't.

Q And you have no doubt whatsoever this comes from Brown & Williamson's files, do you?

A It appears so.

MR. MOTLEY: Your Honor, we move its admission at this time.

MR. OHLEMEYER: Same objection, Your Honor.

THE COURT: Objection is noted overruled. Foundation is sufficient. 4783 will be admitted.

(Plaintiffs' Exhibit(s) 4783 received in evidence.)

MR. MOTLEY: May I hand these to the jury, Your Honor.

THE COURT: This is offered only to Brown & Williamson at this time?

MR. MOTLEY: Yes, sir, only to Brown & Williamson.

Judge, you want this --

THE COURT: I have one. Thank you.

BY MR. MOTLEY:

Q Doctor, do you have the document in front of you?

A Yes.

Q Now, Mr. McCarty, I ask you to assume was the president of the company in 1978; okay?

A Okay.

Q And Mr. Pepples was the general counsel and the vice president; okay?

A Okay.

Q It says, "Attached is a statement by Bill Shinn --" don't you understand Mr. Shinn is a lawyer representing Brown & Williamson?

A I don't know who he is. I can't tell from this document who he is.

Q That's all right. If you don't know, you don't know. -- "concerning the value of the Council for Tobacco Research. Bill mentions

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two aspects of particular value in CTR."
By the way, you know they're a defendant in this case?
A No.
Q "No. 1, the direct legal protection derived by Brown & Williamson; and No. 2, the political and public relations advantage accruing to the industry."
A Yes.
Q Now, look down to the second paragraph. "Turning to litigation value, Mr. Monroe propounded an interrogatory to B&W asking what we had done to keep abreast of this science concerning our product. Our reply tells about the ten eminent scientists who serve on the" -- you know what SAB is, Scientific Advisory Board?

A Yes.
Q "In an advisory capacity at CTR, and it tells about the grants which CTR has made over ten years. Stated another way, our answer says CTR is our window on the world of smoking and health research. This avoids a research dilemma presented to a responsible manufacturer of cigarettes which on the one hand needs to know the state of the art --" what does state of the art mean?
A I assume the current -- current science.
Q "And on the other hand, cannot afford the risk of having in-house work turn sour."
What does that mean?
A I don't know what it means.
Q All right. Now, look at the next to last paragraph of that first page.
A The one that begins with the word "the point"?
Q Yes, sir. "The point here is the value of having CTR doing work in a non-directed and independent fashion as contrasted with work either in-house or under B&W contract, which if it goes wrong, can become," what?
A It says "the smoking pistol."

Q "The smoking pistol in a lawsuit.
"You may also want to refer to the note of February 11, 1977, to you and Dr. Hughes on this subject."
Have you, in your review of these thousands of documents, seen this note of February 11, 1977, to Dr. -- to Mr. McCarty and Dr. Hughes on the subject of smoking pistols?
A I don't recall.
Q You haven't seen that?
A I don't recall if I have or not.
Q Well, if you saw something that talked about smoking pistols, would that be something you'd be likely to remember?
MR. WAGNER: Judge, it's argumentative, same question asked three

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times over.
THE COURT: Sustained.
Q "It is pointed out there that CTR provides a yardstick by which to measure and challenge the claims made against us on the basis of other research reports.
"Furthermore, the mere fact that CTR now has over two decades and $46 million

worth of experience behind it, shows that there is a real controversy here and that the industry is in it for the long haul; at least until real answers are found to take the place of having statistical guesswork."
Now, Doctor, are you aware from your reading of the document that the cigarette industry had a campaign called "The Cigarette Controversy Campaign"?
A No.
Q Are you unaware then that the Tobacco Institute put out thousands of brochures entitled "The Cigarette Controversy"?
A No.
Q You don't know that, okay.
MR. MOTLEY: Your Honor, 270 is in evidence.
THE COURT: Apparently it's not in evidence.
MR. MOTLEY: It's not in evidence? We move it into evidence then, Your Honor.
MR. OHLEMEYER: Your Honor, for the reasons previously stated, it lacks foundation, it's undated, unsigned.
THE COURT: There's no foundation

yet, Counselor.
Q Okay. Doctor, take a moment and look at that document for me, please.
A I haven't read it, but I've just flipped through it.
Q Yes, sir. That's one of the documents, one of the thousands of documents you reviewed; correct?
A I don't believe I've seen this one.
Q All right. Can you confirm for me the nine-digit numbering system on the document? Do you see that?
A Yes, I do see the numbers.
Q Okay. And you've never seen this document before?
A I don't believe so.
MR. MOTLEY: Your Honor, this document I know is in evidence. I thought that one was.
THE COURT: This is 21747. It is.
Q Do you have that document now, Doctor?
A Yes.
Q Look on the first page. You see the name Sharon Boyse on the list of people present? S. Boyse under BAT? Right under Gallaher's,

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right before Covington & Burling?
A Yes.
Q Dr. Sharon Boyse is now employed by Brown & Williamson, isn't she?
A Yes.
Q What is her job?
A She's involved in corporate communications.
Q Doctor, are you aware of the press release she just put out last week about a study on passive smoke?
A The IARC study?
Q Yes.
A Yes.
Q You are aware of that press release?
A Yes.
Q Okay. Are you aware of the press release that was put out by IARC in response to your press release?
A Yes.
Q Now, in this document, sir, it says, we're going to have -- in the middle sentence -- "Philip Morris presents to the U.K. industry their global strategy on environmental tobacco smoke." Then they go on to say they're proposing to set up a team of

scientists, organized by one national coordinating scientist and American lawyers to review scientific literature or carry out work on ETS. Do you see the word, "to keep the controversy alive"?
A I'm sorry. Just a second. Yes.
Q Look at the last page, please.
A Very last page in the back?
Q Yes, sir.
A Okay.
Q Do you recognize Dr. Boyse's signature?
A Yes.
Q Do you see the sentence, the phrase, the fifth line from the start of that paragraph, "to keep the controversy alive"?
A Yes.
Q Are you aware, sir -- turn to the preceding page, if you don't mind, sir.
A Okay.
Q I'm trying to find the exact passage I want, Doctor. Just give me a second.
Doctor, do you know Mr. John Rupp?
A Yes.
Q Tell the jury who he is.
A He's an attorney.

Q Representing?
A I'm not sure who he represents.
Q Well, he represents the Tobacco Institute, doesn't he?
A The Tobacco Institute? I'm not sure.
Q Is he with Covington & Burling?
A I believe so.
Q And is Brown & Williamson a member of the

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Tobacco Institute?
A I believe we are.
Q Please look at -- the page numbers are not on here, but if you look in your nine-digit paging number system, look for the number 333.
A All right.
Q Look at the item No. 9, sir.
A Yes.
Q "Philip Morris did expect the group of scientists to operate within the confines of decisions taken by Philip Morris scientists to determine the general direction of research which apparently would then be filtered" --
Do you see that word?
A Yes.

Q -- "by lawyers to eliminate areas of sensitivity."
Have you ever heard of using lawyers as filters to eliminate areas of sensitivity?
A That's not been my experience.
Q Well --
MR. MOTLEY: Your Honor, might I -- I'm getting ready to go to a different topic.
THE COURT: I think we'll take a break right now, Counselor. Break for about 15 minutes, ladies and gentlemen.
(Standard admonition)
MR. CASSELL: All rise.
THE COURT: You may step down. You can step down, sir. Thank you.
(A brief recess was taken.)
MR. CASSELL: All rise.
THE COURT: Be seated. We're back on the record. The jury is present.
MR. SHOCKLEY: He went to get the witness, Your Honor.
MR. MOTLEY: Your Honor, may I hand you the original of that British Report?
THE COURT: All right. Thank you.

For the record, would you state your name again.
THE WITNESS: Scott Appleton.
THE COURT: Mr. Motley.

BY MR. MOTLEY:
Q Doctor, are you familiar with Dr. -- the name Dr. S. J. Green?
A Yes.
Q Tell the ladies and gentlemen of the jury and the Court who he is or was.
A Well, I know he was a scientist with BATCO. I don't know a lot about him, but I've seen a lot of documents with his name on it.
Q And you know that he was more than a scientist, he was the chief scientist; correct?
A I believe. I guess I believe so.

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Q Yes, sir.
MR. MOTLEY: Your Honor, perhaps you'll recall, it's on the last page, you'll see the initials like we went into before, Dr. Green.
Q Doctor, do you notice on the last page, sir, the initials SJG, the typed initials and then little squirrely signature?

A Yes.
Q And is this one of the documents that you've looked at, sir?
A Yes, I've seen this.
MR. MOTLEY: Your Honor, we move this against British American Tobacco and Brown & Williamson.
MR. OHLEMEYER: Objection, Your Honor. Lack of foundation. BATCO is not a party to this case.
THE COURT: Counselor, you're moving it against BAT Industries?
MR. MOTLEY: And Brown & Williamson.
THE COURT: And Brown & Williamson. All right. It will be admitted as to BAT Industries, PLC, and Brown & Williamson only. That's 1015 for the record, sorry.
(Plaintiffs' Exhibit(s) 1015 received in evidence.)
MR. MOTLEY: Your Honor, I would also, since we're addressing Dr. Green, this is one that's already in evidence, 206. 29026, I'm sorry. You're right.
MR. CASSELL: It is in.

THE COURT: 29026 is in evidence.
BY MR. MOTLEY:
Q First, Doctor, let's look at 1015, the first document I gave you.
A Yes.
Q This is a document authored by Dr. Sidney Green, the chief scientist for BATCO, and the title is "Cigarette Smoking and Causal Relationships." Do you see that, sir?
A Yes.
Q Then he says, "The public position of tobacco companies with respect to causal explanations of the association of cigarette smoking and diseases is dominated by legal considerations."
Do you see that, sir?
A Yes, you've read that correctly.
Q "In the ultimate, companies wish to be able to dispute that a particular product was the cause of injury to a particular person."
Do you see that?
A Yes.
Q Do you know, is your company disputing that your products were the cause of injury to Mildred Wiley? Do you know that?

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A My view is that the -- the evidence is not sufficient to conclude that environmental tobacco smoke caused her disease.
Q Well, your company, to your personal knowledge, has taken the position in every lung cancer case that they're a defendant in that cigarette smoking didn't cause lung cancer even in smokers; right?
A I don't know what our position is in every case that we have or have had.
Q The ones that you're aware of, Brown & Williamson always takes the position that cigarette smoking doesn't cause lung cancer; you know that?
MR. OHLEMEYER: Asked and answered, Your Honor.
MR. MOTLEY: I didn't say every case. The ones he's aware of.
THE COURT: You can answer that.
A That is not my understanding.
Q So you have accepted that cigarette smoking causes lung cancer in an individual case?
A No, I didn't say that either. You asked me -- you said our position is that it does not cause lung cancer. That's not my

understanding.
Q That's not what I asked you, sir. Listen carefully. In the individual smoker cases where a smoker got lung cancer, okay, individual lawsuit, like this one, Brown & Williamson's position is always, to your knowledge, that that individual's cancer -- you can't prove that individual's lung cancer was caused by your cigarettes, isn't it?
A I don't know, sir, what Brown & Williamson's position always is. I can give you my opinion, if you ask me.
Q I asked you -- I asked you that earlier, but what I want to know, you don't know whether Brown & Williamson, in an individual who smoked Kools for 30 years, two packs a day, or Raleighs or anything, Viceroy, that if he claims he's got lung cancer, you don't know your company always contests that the cigarettes caused his lung cancer?
MR. WAGNER: Objection. Asked and answered.
MR. OHLEMEYER: Asked and answered.
MR. MOTLEY: Your Honor, I

rephrased that one to make it specific.
THE COURT: He can answer that, but the question goes to the policy of the company, not his personal opinion. He can answer that.
A Now, is the question that is always -- I don't know what our position always is in these individual lawsuits.

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Q All right.
A I haven't been involved in that many.
Q Well, the ones you've been involved in, let's restrict it to those. Has your company contested that your cigarettes caused disease in the cases that you're aware, in a specific individual?
A My position has been the ones that I've been involved in --
Q Sir, I didn't ask you --
A -- is the position that I've already given you.
Q Sir, Mr. Joe Jones, for example, he gets lung cancer. He claims he smoked Brown & Williamson cigarettes for 30 years. Brown & Williamson's position in those kinds of cases is, you deny that the cigarette

smoking caused Mr. Jones to get lung cancer?
MR. WAGNER: Judge, and since every individual case is different, I mean, it's irrelevant.
THE COURT: He's asking him the general position. If he knows, he can tell us. If he doesn't know, he can tell us that.
A I don't know.
Q You don't. Okay. Let's go back to this document. "In the ultimate, companies wish to be able to dispute that a particular product was the cause of injury to a particular person. By repudiation of a causal role for cigarette smoking in general, they hope to avoid liability in particular cases."
Now, you're telling me that you don't know that that's the position of Brown & Williamson sister company, BATCO.
A I don't know what the position is. I'm not even sure what the date of this document is because it's illegible.
Q 1976, sir. It's 1976.
A Frankly, I don't know BATCO's position, if

they're involved in an individual lawsuit, what their position will be. As I said -- or somebody said -- it depends on the circumstances of the case.
Q Not somebody. That's what Mr. Wagner said.
"This domination by legal consideration thus leads the industry into a public rejection in total of any causal relationship between smoking and disease and puts the industry in a peculiar position with respect to product safety discussions, safety evaluations, collaborative research, et cetera. Companies are actively seeking to make products acceptable as safer, while denying strenuously the need to do so."
Has Brown & Williamson been doing that, sir?

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A Not in my opinion.
Q All right. "To many, the industry appears intransigent and irresponsible."
Do you see that?
A Yes.
Q What does intransigent mean to you?
A Well, it could mean a lot of things. It depends on the circumstances. I suppose it

means resistant.
Q "The industry has retreated behind impossible demands for 'scientific proof', whereas such proof has never been required as a basis for action in the legal and political fields. Indeed, if the doctrine were widely adopted, the results would be disaster."
Do you see that, sir?
A That's what it says, yes.
Q Now, let's look at 29026.
MR. MOTLEY: The other document, folks.
MR. OHLEMEYER: Your Honor, may I ask that the last sentence of that paragraph be read?
MR. MOTLEY: I'm happy to read anything you want.
THE COURT: Go ahead.
Q "I believe that with a better understanding of the nature of causality, it is plain that while epidemiological evidence does indicate a cause for concern and action, it cannot form a basis on which to claim damage for injury to a specific individual."

Did I read that correctly?
A Yes.
Q Okay. Now, look over at 29026, please.
MR. MOTLEY: That's the other document I gave you, folks.
A Yes, I see it. March 1978?
Q Yes, sir. Page 1. First of all, do you know the names of Dr. Green and Dr. Ayres?
A Well, I assume that the Dr. Green is the same as on this previous document.
Q Right.
A I have seen the name Dr. Ayres on documents. I don't know who he is. I've never met him.
Q And you've seen the name Dr. D.G. Felton, too, right?
A Yes, I have.
Q Okay. No. 1 -- "Notes on group research and development conference, Sidney, Australia. March 1978.
"No. 1, there has been no change in the scientific basis for the case against smoking. Additional evidence of smoke dose-related incidence of some diseases associated with smoking has been published. But generally, this has long ceased to be an

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area for scientific controversy."
Do you see that, sir?
A Yes, I do.
Q And do you see who signed this? Who is the author of this? Do you see the last page, sir?
A Well, it looks like Mr. Green again.
Q Yes. Now --
A What he doesn't explain is controversy to whom? I don't know if that's his view or if he means that's the view of the scientific community or the public health authorities or what. I can't tell from this document what the context is and what he's referring to.
MR. MOTLEY: This is 21258, Your Honor.
Q Just take a moment to look at that, sir.
A All right.
Q Sir, the names on the first page, Dr. Hughes was an employee of Brown & Williamson.
A Yes.
Q He was a chief scientist at the time; correct?
A I know he was at some point and I -- if

you -- I'll accept your representation he was at this time. I simply don't know.
Q Mr. Sandefur later became the president of the company, didn't he?
A Yes.
Q Mr. Kohnhorst was your boss at one time; right?
A Well, not directly, no.
Q Well, he was --
A Once removed.
Q -- once removed. He was Jeff Wigand's boss and Jeff Wigand was your boss?
A That's correct.
Q All right. And do you know -- you know who Dr. Blackman is from BATCO, don't you?
A I don't know him. I've never met him, but I've seen his name on a lot of documents.
Q And Dr. Sanford?
A Yes, I've seen all these names.
Q You've seen all of these names. All right.
MR. MOTLEY: Your Honor, first --
Q First of all, what is the CAC? You see that mentioned there. Tell the jury what CAC means.
A I don't know this particular acronym.

Q Okay. You don't know that that's a description of British American Tobacco Companies.
A I guess --
Q Cigarette-affiliated companies.
A I really don't know what CAC stands for.
MR. MOTLEY: Your Honor, we move 25258 into evidence against Brown &

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Williamson only.
THE COURT: Any objection?
MR. OHLEMEYER: Lack of foundation and relevance, Your Honor.
THE COURT: 21258 will be admitted as to Brown & Williamson only, ladies and gentlemen.
(Plaintiffs' Exhibit(s) 21258 received in evidence.)
MR. MOTLEY: And I'm done with those other two, Mr. Cassell.
THE COURT: All right.
MR. MOTLEY: You have enough?
MR. CASSELL: Yes, sir.
Q Look, please, at page 4. "Smoking and Health." Do you see that?
A Yes.

Q "The current legal cases in New Jersey were explained. Although they called for extreme care in what was said or implied in our writings and talking, we must continue to stress the controversy and cite anomalies. To remain silent would not be in the interest of the industry."
Does that refresh your memory at all, sir, about what the position of your company is in individual cases?
MR. OHLEMEYER: Objection, Your Honor. It's argumentative.
A This document contains a lot of things, and most of the document concerns projects to make safe cigarettes.
Q Sir, can you answer my question, please?
MR. OHLEMEYER: My objection is the question is argumentative, Your Honor.
THE COURT: No, no. Overruled.
Q Please answer my question, sir. My question is: Does that refresh, that paragraph, refresh your memory that your company's position in legal cases was to claim that there was still a controversy about whether cigarettes cause lung cancer?

A Well, if we're asked our opinion on the science, we will give our opinion if there are anomalies and there are uncertainties, we'll certainly express them. To my knowledge, we don't have a, "policy" in litigation to stress a controversy. But certainly if there are controversies that are legitimate scientific issues, we will discuss them when we're asked about them.
Q Well, does that refresh your memory that at least in those New Jersey cases, Brown & Williamson's position was to claim there was a controversy?
MR. OHLEMEYER: Lack of foundation.
MR. WAGNER: Objection.
THE COURT: Sustained. He answered the question.

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MR. MOTLEY: Your Honor, Exhibit 90 is in evidence.

And I'm done with that one, Mr. Cassell.

Q Look at page 2, please, sir.

A Yes.

Q The third paragraph that begins, "The May discussions."

A Yes.

Q The May discussions on page 2.

A Yes.

Q "The May discussions accomplished the objectives we set for them and follow-up activities are now in order. Consequently, we should arrange a meeting in London with BAT legal and perhaps Bob Northrip" -- that's the name of the lawyer from Shook Hardy & Bacon; right?

A Yes.

Q -- "to delineate more specific counsel to the BAT, including proposals for the structure and organization of BAT programs and statements which would hold to the minimum feasible level their potential impact upon U.S. products liability litigation."

You understand that this case that brings us here today is a product liability case.

A Yes.

Q "Topics would include proposals for organizing programs already on the table and general procedural guides for lawyer

counseling of ongoing and future programs. For example, if Project Rio must continue."

First what is Project Rio?

A Project Rio was another project. It had several objectives, one of which was to try to find ways to reduce a particular type of biological activity in cigarettes; namely, that measured by a mutagenicity test in a strain of bacteria, and that was the major objective. It had other objectives as well, but basically it was in the general area of safe cigarette research.

Q That was a scientific project; right?

A Yes.

Q It says, "For example, if this scientific project, Project Rio, must continue, restructuring probably will be required to control the risk of generating adverse evidence admissible in U.S. lawsuits. Dr. Thornton's scientific literature review publication may already have been sent up as a law department function."

A Yes, I see that.

Q "Direct lawyer involvement is needed in all BAT activities pertaining to smoking and

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health from conception through every step of the activity."

Do you see that?

A Yes, I do.

Q In other words, Doctor, what this document is suggesting, whether it happened or not, it's suggesting that the lawyers ought to be involved intimately with scientists; right?

A Well, what it's a reflection of is that the litigation that was going on, intense litigation like we have now, was having a hampering effect on our ability to make a safe research, to do the research required to make safer products because of concern that anything that would be generated or anything that would be said would ultimately be used by opposing counsel against us. We realized it was a having a chilling effect on our research efforts, and we were trying to find ways to address it.

Q So the way you were going to address it is have a lawyer looking over the shoulder of every scientist?

MR. OHLEMEYER: Objection, Your Honor.

A Not at all. Lawyers certainly --

MR. MOTLEY: I'm sorry, Judge, did you rule?

THE COURT: Overruled. You can answer that question.

A Lawyers may --

Q Can you answer my question?

A I'm trying to explain, if you'll let me, sir.

THE COURT: I think he understands your question. Let him give his answer.

MR. MOTLEY: Your Honor, I'd like a yes or no, and then he can explain it later.

MR. WAGNER: But he's not required to give just a yes or no answer.

THE COURT: Doctor, you can answer the last question as you started to.

THE WITNESS: I appreciate it, sir.

A Lawyers, certainly -- we've been under tremendous amount of litigation for 20 or 30 years. Naturally, lawyers are interested in any aspect of the business that may impact on the litigation. From time to time, they have counseled us on what to write -- not what to write, but be clear, not write

anything that's ambiguous, make sure that when we interpret our data, that we don't overinterpret it or speculate. A lot of scientists speculate and make speculative statements, and if they do that in writing, that can then be held out by a demonstrating fact by opposing attorneys.

So we would receive counsel from time

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to time on being cautious and careful in what we write and what we say. But I don't regard that as looking over our shoulder, and I think there was a very good reason for it, because it was having a hampering effect on your ability to do research to ultimately try to find a way to make a safer cigarette.

Q Well, do you see, sir, it says, "If Project Rio, a scientific project, must continue" -- Do you see that?

A Yes. It does say it must continue; correct.

Q "Restructuring probably will be required to control the risk of generating adverse evidence."

Do you see that?

A Yes, I see that.

Q Let me turn to another subject, sir. Give

me --

Doctor, you know a little bit more about CTR than what you told the jury, that you had a vague understanding of. You know a lot more than that, don't you?

MR. OHLEMEYER: Objection, Your Honor, argumentative.

MR. MOTLEY: No, sir, I think it's not, Judge.

THE COURT: You may answer.

A I have never attended a CTR meeting, I've never been a part of their proceedings or meetings, but I have reviewed their reports. I've reviewed their annual reports, and I've reviewed research that's been funded by the CTR.

Q So you've got more than a vague recollection that you told the jury about the CTR, don't you?

MR. OHLEMEYER: Objection, asked and answered.

MR. WAGNER: Objection.

THE COURT: Sustained to that.

Q You reviewed the annual reports; right?

A I've reviewed some annual reports, yes.

Q And you've reviewed some of the research; right?

A Yes, I have.

Q And you've reviewed literally hundreds of documents relating to CTR; correct?

A Now, I can't say that.

Q Dozens?

A I wouldn't even say dozens.

Q You knew who the Scientific Advisory Board was, didn't you?

A Yes. Well, no, no. I knew who one member of the -- no, it was Dr. Hocket. That's who it was. You asked me who Mr. Hocket was. I knew who he was.

Q And you knew what the Scientific Advisory Board was.

A I'm aware that they have one, because they

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talk about it in their annual report.
MR. TRINGALI: Objection, Your Honor. I think this is beyond the scope of direct.
THE COURT: Overruled.
MR. MOTLEY: I move the admission against Brown & Williamson, Your Honor, and the Council for Tobacco Research, Exhibit

34353. You'll notice it's a copy to Mr. Addison Yeaman, at the bottom. That's why I move it against CTR and Brown & Williamson also.
MR. OHLEMEYER: Your Honor, may we approach for a moment?
THE COURT: Yes.
(Bench discussion)
Q Doctor, do you recall preparing a report for a case in Minnesota?
MR. OHLEMEYER: Objection, Your Honor, relevance.
MR. MOTLEY: Cigarette, tobacco and health.
THE COURT: Overruled. You may answer that.
Q Correct?
THE COURT: Did you prepare a report.
A You mean like an expert report?
Q Yes.
A Yes, I have.
Q In fact, the lawyers drafted the report for you, didn't they?
A Well, the process --

MR. WAGNER: Judge, this is irrelevant to this case.
MR. MOTLEY: Your Honor, it is not.
THE COURT: You may answer that.
A The process that was involved --
MR. MOTLEY: Can I get an yes or no, and then he can explain, Judge. It's a simple question.
MR. OHLEMEYER: Your Honor, I object. It's unfair to ask a witness about rules and procedures that relate to lawyers and lawsuits in preparation of cases.
THE COURT: The question was, did you report a report for Minnesota? He answered yes. Then the next question was, did the attorneys prepare the report. That's a simple question. You can answer that yes or no.
A The answer is yes, after extensive interviews with me and me reviewing drafts that they had prepared and revising drafts and going through an iterate back and forth process.
They did the actual drafting, but it was after getting interviews from me about

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my views, and then me making sure that it agreed with my views. But they did the actual pen to paper, but I reviewed it all and we -- considerable revisions were made.

Q Right. But the lawyers prepared the original draft, you looked at it, you made changes, they sent you another draft, and finally you came up with a final report; right?

MR. WAGNER: Judge, he just --

THE COURT: He's answered that. He's answered that.

MR. MOTLEY: That's fine.

Q Dr. Appleton, there's been testimony -- you missioned Dr. Wigand. Do you recall that, on direct; Jeff Wigand?

A I think you asked me about Dr. Wigand.

Q Oh, no. You were asked about Mr. Wigand by Mr. Ohlemeyer.

A You're correct.

Q All right. And Dr. Wigand testified here in person. Are you aware of that?

A Yes.

Q Were you told what he said?

A No. I read some of it in the paper, but --

Q You read it in the paper. You didn't look at the transcript?

A No.

Q Dr. Wigand testified about Y1. Would you tell the ladies and gentlemen of the jury what Y1 is.

MR. OHLEMEYER: Objection, Your Honor. Relevance, beyond the scope of direct examination.

MR. MOTLEY: He brought up Dr. Wigand, Your Honor.

THE COURT: Overruled. You may answer.

A Okay. Y1 is a -- well, it's just a code name, a project name for a breeding strain of tobacco that has a higher than normal level of nicotine.

Q All right. Now, do you sit here and deny today that Brown & Williamson manipulated or spiked the nicotine content of cigarettes?

MR. OHLEMEYER: Argumentative.

THE COURT: Rephrase your question.

Q Did Brown & Williamson manipulate the levels of nicotine in cigarettes?

A No. In commercial cigarettes?

Q Any cigarettes.

A Manipulate or spike?

Q Yes.

A No.

Q Okay. Y1 is a high nicotine genetically altered plant; right?

A It's not a product of recombinant DNA technology. It's a product of plant

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breeding techniques.
Q But the bottom line is, it bred a tobacco plant that had a heck of a lot more nicotine than regular tobacco plants; right?
A Well, the original cultivar came from a USDA project, and it did have a higher level of nicotine.
MR. MOTLEY: Your Honor, I asked him a question and now he's giving me a recitation about something --
THE COURT: Let me hear your question again.
BY MR. MOTLEY:
Q Can you please listen to my question, sir.
MR. OHLEMEYER: Your Honor, I object to Mr. Motley admonishing the witness.

THE COURT: Sustained. Just repeat your question.
Q Can you answer this question, please, sir? The question is this: Does Y1 have more nicotine in it than regular tobacco plants, yes or no?
A Yes, it does.
Q All right. Now, sir, you're aware, are you not, that in 1994 your company, Brown & Williamson, promised the government that it was going to quit using Y1 in commercial cigarettes?
A I'm not aware of what representations Brown & Williamson made. All I know is what I've read in the press. And I've read all kinds of things, but I don't know actually what Brown & Williamson represented or said or promised.
Q Well, you know that Dr. Kessler, the head of the FDA, testified before Congress that --
MR. WAGNER: Well, Your Honor, just a minute now. You can't --
MR. OHLEMEYER: I object to this.
THE COURT: Sustained as to that.
Q The fact of the matter is, Dr. Appleton,

Brown & Williamson promised the government it wasn't going to use Y1, and two months later it started using it again; isn't that true?
MR. WAGNER: Judge, objection. This witness --
THE COURT: Overruled. He can answer that if he knows.
Q You know that's true?
A I believe I've answered that question. I don't know what the nature of the representations were that Brown & Williamson made to Congress.
Q Well, you did continue to use it, didn't you?
A We continue to use it, yes.
Q Now, sir, give me --

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A Actually, we've recently told Congress that, too.
Q Told them what?
A That we're using it.
Q Still using it.
A Well, it's not a secret.
Q Why did you tell them you were still using it if you hadn't told them you weren't going

to be using it?
MR. OHLEMEYER: Argumentative, Your Honor.
THE COURT: Sustained.
MR. MOTLEY: Excuse me, Your Honor.
Q Now, Doctor, first of all, you've been involved in meetings relating to Y1, have you not?
A Some meetings. It depends on which type of meetings you're referring to.
Q Well, are you familiar with this BATCO document? You've seen this before?
A No, I haven't seen this one.
Q Who is Mr. Brooks?
A I don't know. I've heard the name. This Brooks, I assume, is Geoff Brooks because the initial is G, which I've heard the name, but I don't know him. I've never met him.
Q You know he's a BATCO employee; correct?
A Actually, I didn't know that either, but I'll accept your representation.
Q All right, then. How about N. Davis?
A I don't know who N. Davis is.
Q Well, do you see the leaf department?
A Well, I see another stamp on here.

Q Right.
A That's been overlaid on top of this document, it says leaf department.
Q And what's the leaf department?
A That would be the department that addresses issue of blending, leaf blending, what sort of recipes might be utilized in cigarette design.
Q Now, you mentioned earlier Greendot. You remember that?
A I don't remember mentioning Greendot earlier.
Q What is Project Greendot?
A A Greendot was yet another strategy for a cigarette that might be, hopefully be, thought to be safe or safer.
Q Safe?
A Well, that might be judged to be safe or safer. Whether it is or not, we didn't know, but that was the hope. It was again -- it was a continuation of our research to hopefully make a safer cigarette.
Q Look at the next page, sir.
A Okay.

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Q You see B&W mentioned in Y1, second paragraph?
MR. OHLEMEYER: Excuse me, Your Honor, is this document in evidence?
THE COURT: Not yet.
MR. MOTLEY: I'm getting ready to move it into evidence.
A You mean that B&W's work is concentrated on consumer benefits.
Q Right. It says, "Recommendations from B&W on the use" --
MR. OHLEMEYER: Excuse me. I object to reading from a document --
THE COURT: Sustained.
MR. OHLEMEYER: -- of a non-party that he has no personal knowledge of.
MR. MOTLEY: He asked the question, Your Honor. It was produced by BATCO.
MR. OHLEMEYER: They're not a party to this lawsuit, Your Honor.
THE COURT: I understand.
BY MR. MOTLEY:
Q Sir, does the second paragraph mention B&W using Y1, yes or no?
A Well --

Q Page 2.
A Yeah, they both do, both paragraphs do.
MR. MOTLEY: All right. Your Honor, we move against BAT Industries and Brown & Williamson Exhibit 21299, regarding Y1.
MR. OHLEMEYER: Lack of foundation, Your Honor.
THE COURT: As to BAT Industries and Brown & Williamson, it will be admitted.
(Plaintiffs' Exhibit(s) 21299 received in evidence.)
Q I just have one sentence to ask you about here. Would you look on page 1, please.
A Same document?
Q Yes, sir. It says, "Blending. Y1 tobaccos offer high nicotine content with normal tar potential and could, therefore, be of benefit in designing low-tar cigarettes while maintaining smoker satisfaction."
Did I read that correctly?
A I'm -- I haven't found you, I'm sorry.
Q Under "Blending." Page 1.
A Right. Yes.
MR. MOTLEY: Your Honor, I now am

going to ask that 21338 be admitted against Brown & Williamson only.
THE COURT: Thank you.
MR. OHLEMEYER: No foundation for any of this, Your Honor. It's beyond the scope of the direct examination.
THE COURT: Any questions for the witness about this document?

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MR. MOTLEY: Yes.
Q Doctor, you admit this is a Brown & Williamson R & D & E report, don't you, sir?
A Certainly appears to be.
Q Yes, sir. And all of these people whose names appear here are known to you to have been or still are Brown & Williamson employees?
A Yes.
MR. MOTLEY: Move its admission against Brown & Williamson, Your Honor.
MR. OHLEMEYER: Same objection.
THE COURT: Over objection, 21338 will be admitted as to Brown & Williamson only.
(Plaintiffs' Exhibit(s) 21338 received in evidence.)

Q Doctor, would you kindly look at page 1. "The objective in this first phase of the study was to evaluate --" excuse me. The subject is the status of high nicotine tobacco evaluation.
"The objective in this first phase of the study was to evaluate the three individual grades," and then they mention Y1; correct?
A Yes.
Q All right. Then it says, "Individual grades. Y1 is a high nicotine strain developed at B&W experimental farm in North Carolina. Seeds from such strains were used for growing tobacco in Brazil."
Do you see that?
A Yes.
Q Are you aware, sir, of the allegation that your company smuggled Y1 seeds --
MR. WAGNER: Your Honor, prejudicial, widely --
THE COURT: Sustained.
Q Sir, do you know Roger Black?
A Yes.
Q Tell the jury who he is.

A He's our director of leaf blending.
Q Have you reviewed his deposition about Y1 in Brazil?
A No.
Q You haven't.
A No.
Q Look at page 2, please, sir. Actually, page 3, I'm sorry. Under the first table, Figure 3, you have a paragraph that begins "The results show"-- Do you see that?
A Yes.
Q --"that at both tar levels, the tar-to-nicotine ratios of these samples are 25 to 30 percent lower than those of the corresponding Merit styles. This demonstrates that by using high nicotine tobaccos, the tar-to-nicotine ratios in

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smoke can indeed be altered."
Did I read that correctly?
A Yes.
Q So if you use Y1, and you reduce the tar, you can keep the nicotine levels higher, can't you?
A Well, that's what these experimental results show, and they're in line with what health

authorities were, in fact, recommending that companies do as a strategy for making safer cigarettes.
Q My point, sir, is simply this: Take the regular tobacco plant -- take tobacco from a regular plant, combine it with Y1, you can reduce the tar, but maintain the nicotine levels where they were; right?
A Well, you can keep it at the levels that a traditional, typical cigarette is while at the same time lowering the tar. That's technically possible, yes.
Q But if you just use regular tobacco plants, when you lower the tar, it lowers the nicotine; right?
A Well, it depends on what you do. There's a lot of things you can do with a cigarette but...
Q As a generally proposition?
A Relative to if you use Y1 tobacco at high levels, yes.
Q I didn't say Y1. I said if you take the regular tobacco plant and you lower by blending or however, the tar nicotine content, it lowers the nicotine?

A Generally it comes down, yes.
Q So what you did with Y1 was to manipulate the nicotine levels, didn't you?
MR. WAGNER: Objection.
A That's what was done in this experimental research, but that's not what we ultimately did commercially. We never did that. It never came to market.
Q You put tens of thousands of tons of Y1 in commercial cigarettes that you sold up into 1994, didn't you?
A Yes, but we used extremely low levels, because we realized when we did the consumer work on this, the bottom line is people didn't like it. They didn't like the taste of it, but we ended up being stuck with a couple million pounds of tobacco we had to work off, so we metered in very teeny amounts of it in order to utilize our stocks. The levels were so low they didn't affect in any material way the actual levels of nicotine.
And one thing I want to remind the jury is that all of our nicotine levels are published in FTC reports. If there's

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something unusual going on, this is all a matter of public record, and anyone could observe this if our nicotine levels were going sky high, which they didn't.

Q Let me get this straight. You had millions of pounds of Y1 tobacco. And you didn't want to get to stuck with it, so you just sprinkled a little bit of it in your cigarettes?

MR. OHLEMEYER: Your Honor, I object to that as being argumentative.

THE COURT: I think he can answer that.

A We worked off stocks, existing stocks of Y1 by using very small amounts in some products.

Q Okay. Now, give me 25934.

Doctor, would you agree that this document was produced by Brown & Williamson?

A Well, I don't know how I can tell that.

Q Well, why don't you look right in the middle of it.

A Yeah, there is a stamp that says that.

Q All right. And did you know who Mr. Wilson Wyatt was, sir?

A Wilson Wyatt, no.

Q Do you have any reason to dispute that he was the national -- at a national sales management meeting?

MR. OHLEMEYER: Objection, Your Honor.

A I have no idea.

MR. MOTLEY: May I approach, Your Honor? Just for this sheet showing who he is.

(Bench discussion)

THE COURT: You're offering the document, Counselor?

MR. MOTLEY: Yes, sir, against Brown & Williamson only.

THE COURT: Brown & Williamson only, will be admitted, 25934.

(Plaintiffs' Exhibit(s) 25934 received in evidence.)

Q Doctor, I just have one question on this document.

MR. MOTLEY: It's on page 6, ladies and gentlemen.

A Okay.

Q Page 6. Do you know that generally people

talking about public smoking laws, they're talking about smoking restrictions?

A I suppose that that could be -- that could mean that, yeah.

Q Let me read this to you, sir, at the last sentence of that page 6: "If public smoking regulations forced each smoker in this country to reduce consumption by only one

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cigarette per day, the loss to our industry would be $500 million per year."
See that, sir?
A Yes, you've read that correctly.
Q Now, Doctor, can you tell me whether or not Brown & Williamson, to your personal knowledge, has opposed restrictions on the ability to smoke in public?
A I don't know. I'm not -- that's not a part of the company that I am involved in.
Q Now, sir, the last thing I want to ask you about. Do you recall, sir, before the break I asked you if you were familiar with a press release issued by Brown & Williamson in regard to research done by the International Agency for Research Against Cancer?

A Yes.
Q And is this that press release?
A Well, it appears to be.
MR. MOTLEY: Your Honor, I move it into evidence against Brown & Williamson only as the next document.
MR. OHLEMEYER: Your Honor --
THE COURT: I'm sorry.
MR. OHLEMEYER: -- lack of foundation, hearsay.
MR. MOTLEY: It's a press release of Brown & Williamson's that he says he's personally familiar with, Your Honor.
MR. OHLEMEYER: Well, he didn't say he was personally familiar.
Q Are you personally familiar with that, sir? You told me you were.
A I'm aware that a press release was released.
Q You see the name Sharon Boyse, don't you?
A Yes.
Q This is good news, she said, didn't she?
MR. OHLEMEYER: Your Honor, if Mr. Motley wants to move it into evidence, he ought to ask you to move it into evidence before he starts asking questions.

MR. MOTLEY: I did.
THE COURT: All right. This is 108. Over objection, it will be admitted only as to Brown & Williamson.
(Plaintiffs' Exhibit(s) 108 received in evidence.)
Q You told me before the break that you were familiar that after Brown & Williamson released a press statement, that the World Health Organization released one. Do you remember telling me that?
A Yes.
Q And that's a copy of it, isn't it?
A Well, this doesn't look like the one I saw, but I assume it is. I haven't had a chance to read it yet.
Q Well, why don't you take a look at it.

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A Yes, this looks like it.
Q All right.
MR. MOTLEY: Your Honor, I move the admission of this document as 109.
MR. OHLEMEYER: Your Honor, this is hearsay. I object to it.
THE COURT: It looks like it.
MR. MOTLEY: Your Honor, but it's in response to their press release.

MR. WAGNER: And, Judge --
A I can't --
MR. MOTLEY: Let me ask him a question about it.
A There's nothing that relates this to this press release.
THE COURT: It's not in evidence.
Q Let me ask you a question. You are personally aware, are you not, that the World Health Organization and the International Agency for Research Against Cancer?
A It's called the International Agency for Research on Cancer.
Q On cancer. Okay. That they published a study on passive smoking in the last few weeks; correct?
A It wasn't a study. It was an update of the results of the study. It was in their biannual report.
Q All right. Anyway, they issued something that dealt with passive smoking; right?
A Right.
Q And Brown & Williamson got ahold of it and issued this press release, which is 108; right?

A Well, they did issue this press release.
Q Well, that's in reference to the World Health Organization, IARC Report on Passive Smoking; right?
A Yes.
Q And then you're personally aware that the World Health Organization issued its own press release; right?
A Yes.
Q And that position taken by the World Health Organization is that secondhand smoke causes lung cancer, isn't it?
MR. WAGNER: Judge, please, I mean --
MR. OHLEMEYER: Your Honor --
MR. WAGNER: -- he's testifying -- what's the relevancy of any of this to something that happened in the last week or so to the issues that are in this case that happened back in 1991?
THE COURT: He can ask the witness if he's aware of the position of the World Health Organization.

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Q Are you?
A Well, I'm aware of the position of both of these, if I can discuss them.
Q I understand that. The judge didn't ask you that. He asked you if you're aware of the position of the World Health Organization.
A Let me see what they said.
MR. WAGNER: I also question, Your Honor, and object to the relevancy of press releases. It came out in the last week or so, doesn't have anything to do with this case.
A This press release isn't complete. It doesn't discuss all the findings of their study. It discusses some of the findings of their study.
Q Doctor, the question that was posed to you was a simple one. Are you aware that the World Health Organization issued a press release after this study came out saying passive smoking --
MR. OHLEMEYER: Your Honor, if he can't admit the press release, he shouldn't be allowed to tell the jury what it says. That's not proper, and he knows it.

THE COURT: Sustained to the way the question was phrased.
Q Sir, you are aware, are you not, that the World Health Organization's position on secondhand smoking is that it causes lung cancer?
MR. WAGNER: Objection, Your Honor. He just did the same thing you just sustained an objection to, Your Honor.
MR. MOTLEY: No, I didn't.
THE COURT: Objection is sustained. That will go out.
Q Are you aware of publications by the World Health Organization, sir, forget the press release, where they state secondhand smoke causes lung cancer?
MR. WAGNER: Objection.
THE COURT: Overruled, you may answer that.
A Yes, I'm aware of publications that state that.
MR. MOTLEY: No further questions, Your Honor.
THE COURT: Any redirect, Mr. Ohlemeyer?

MR. OHLEMEYER: Yes, Your Honor.

REDIRECT EXAMINATION

Q Dr. Appleton, am I correct that the World Health Organization's International Agency for Research on Cancer issued a biannual report this last month?
A Yes, they did.
Q Okay. And is this a copy of a portion of

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that report?
A Yes, it is.
Q And they report on the results of an epidemiology study they completed, didn't they?
A Yes, they did.
Q And did that study find a statistically significant relationship between exposure to environmental tobacco smoke and the subsequent development of lung cancer?
MR. MOTLEY: Excuse me. Is he asking him his opinion, Your Honor, or what the --
THE COURT: He asked him what the study concluded.
Q Based on --
MR. MOTLEY: No, no. I'm asking

him, Your Honor, if he's now interpreting the study as opposed to reading what the study said.
Q Tell us what the biannual report says.
A The biannual report.
MR. MOTLEY: Excuse me, Your Honor. I would like -- I object unless he's asking this man's opinion or if he is asking him to quote from the document itself. I have no objection to either one, but I think I'm entitled to know what he's doing.
Q Tell us what the results were that were reported in the biannual report.
MR. MOTLEY: That doesn't help me. I want to know if he's giving us his opinion.
MR. OHLEMEYER: He's going to read it, Your Honor.
THE COURT: He can read it.
MR. MOTLEY: That's fine, that's what I want.
A Well, I'll do both. I'll read and then I'll provide comments, I guess.
MR. MOTLEY: Excuse me, Your Honor --

THE COURT: He just asked you what it reported.
A Okay. "An IARC coordinated international collaborative case/control study was aimed at investigating the relationship between exposure to ETS and to other environmental and occupational risk factors and the risk of lung cancer in subjects who have never smoked."
MR. MOTLEY: What page are you on, sir?
THE WITNESS: Well, on this copy it says page 76.
MR. MOTLEY: Okay.
A "A total of 650 cases in 1,542 controls have been enrolled in 12 centers in seven European countries."

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Q Let me stop you right there. In terms of the epidemiology studies that have examined this issue, is this a small, a medium or large study?

MR. MOTLEY: Your Honor, I'd like to know him if he's asking him his opinions. I think it's important for us to know if he's reading.

THE COURT: The last question is his opinion?

MR. OHLEMEYER: Yes.

Q Have you reviewed the epidemiology studies that relate to --

A Yes, I have.

Q In terms of those studies, is this a small, medium, or large study?

A This is one of the largest studies that's ever been conducted. There's only one other study that's been done that's larger. It included 653 cases, so this, in essence, is as large as the largest that's ever been done. To put it in perspective, some studies have as few as six to eight cases, so this is a big study, one of the largest ever conducted in the world.

Q What were the results as reported?

MR. MOTLEY: Reported, okay.

A Let me finish reading. "These controls have been enrolled in 12 centers in seven European countries. Information on exposure to occupational carcinogens, air pollution, background radiation, and dietary habits, as well as lifelong exposure to ETS has been

collected by personal interview of cases and controls. Self-reported nonsmoking status was confirmed by interview of relatives. The relative risk of lung cancer was 1.16."

Now, to put that in perspective --

MR. MOTLEY: Excuse me, Your Honor, I would like --

THE COURT: I think he just asked you what it reported.

Q Did they give a confidence interval for that?

A Yes, they do. They say the 95 percent confidence interval was 0.93 to 1.44.

Q Okay. And what does the -- what does the confidence interval measure?

A What that measures is the potential range of results that could have occurred merely by chance.

MR. MOTLEY: Your Honor, again --

A So, in essence, it's possible that the result could have actually resulted to report less than one, which would actually indicate a protective effect if we assume this is a causal relationship, which I do not assume.

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When a confidence interval goes below 1, as it does here --

MR. MOTLEY: Excuse me, Your Honor. I want to make sure the record is clear he's not reading out of the document. He's offering interpretations.

THE COURT: The last question went to his interpretation.

A When a confidence level falls below 1, as it does in this case, then that study is deemed to be not statistically significant. In other words, it may have happened really by chance. And by convention, scientists don't rely on results that are not statistically significant.

In fact, the EPA has guidelines. They have written guidelines about doing risk assessments, and according to their own guidelines, if a result is not statistically significant, they do not proceed with the continuation of a risk assessment. So these are -- this is a standard convention within the scientific community, the Environmental Protection Agency and others.

So in this case, the relative risk was

not statistically significant, and it was also quite small.

As long as I'm providing commentary --

Q Let me ask you this, Doctor: The relative risk they calculated was above 1 but below 2?

A Correct.

Q Based on the 95 percent confidence interval, it was not a statistically significant increased risk?

A That's correct.

Q Which is to say you can't rule out chance or mistake?

A The possibility that this could have -- the result could have been less than 1 or it could have been chance.

Q Did they include any data that specifically looked at the issue of adenocarcinoma?

A There's no data, but what they say is, is that -- before we go on to that, I'd like to also report the other relative risks and point out another anomaly here.

They also report -- and that was for exposure from a spouse.

Now, they report a relative risk of

1.17 for exposure in the workplace.

Q What were their confidence intervals on that?

A They were 0.94 through 1.45.

Q Again, is that a statistically significant increased risk?

A No, it's not.

Q All right.

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A And then let me give one more finding that they had. They also then combined the exposures and said, well, if you're exposed to both your spouse and in the workplace, what is your risk? And that risk turned out to be 1.14. Actually, less than any of the individual risks.
Q Was it statistically significant at the 95 percent?
A No. Let me give you the confidence levels. They were 0.88 through 1.47.
Q Now --
A If we take -- let me just make a comment. If we take these at face value --
MR. MOTLEY: Excuse me, Your Honor. Number one, there's no question, but --
THE COURT: I think you've answered

his question.
Go ahead, Mr. Ohlemeyer.
MR. MOTLEY: The second thing is if he's going to give opinions, I'd like it clearly delineated in the record.
Q My question, Doctor, is refer to figure 20 for me.
A Yes.
Q Did they describe the relative risk of lung cancer by years of exposure to environmental tobacco smoke from spouse or workplace and by histological cell type?
A Yes, they do.
Q And is there -- there's a bar or a relative risk axis; right?
A Yes.
Q And there's a years of exposure axis?
A Yes.
Q And then there's -- they have a line for 1; right?
A Yes.
Q In this study, do they describe any increased risk, any risk over 1, of developing adenocarcinoma as a result of spouse or workplace exposure with fewer than

36 to 43 years of exposure?
A Well, the risk is 1. So it's essentially no different than people who are not exposed to ETS. So they have shown no elevated risk for adenocarcinoma for exposures less than 36 years.
Q Doctor, you're a Ph.D. in toxicology?
A That's correct.
Q Do you know whether this Mr. Roach that Mr. Motley asked you about is a scientist or a public relations man?
A I don't know. I don't know Mr. Roach.
Q Do you have that exhibit in front of you, No. 34327? It's the one, the transcript from the news program.
A Oh, yes.
Q See the last page, page 3?

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A Yes.
Q Where the anchor person says, "The warning is there on every pack, cigarettes are hazardous to your health, and yet millions of people say the pleasure they get from smoking outweighs the danger. The solution, therefore, is not less smoking but safer smoking, and Wave's Janet Lomax says steps

are already being taken in that direction."
A Yes.
Q What you described for us this morning, general reduction, selective reduction, heating not burning tobacco, tobacco substitutes, are those the kinds of steps that have been taken and are being taken to --
A Absolutely.
Q -- to produce these types of products?
A Yes.
Q Dr. Appleton, does all tobacco have the same amount of nicotine in it?
A No, it doesn't.
Q Does it depend on the type of tobacco?
A Well, it not only depends on the type of tobacco, but it depends on the agricultural conditions. And you can get crop-to-crop variation year to year. It varies depending on the stalk position of leaves on the plant. It varies by a number of factors.
Q Does blending tobacco in a cigarette affect the tar and nicotine delivery?
A It can.
Q And regardless of how you blend the tobacco

in a cigarette, is the tar and nicotine delivery measured according to the FTC method and published?
A Yes. The levels of nicotine and tar delivered are measured and they're published by the FTC. It's a matter of public record.
Q Is there a difference between casings and flavorings that are added to tobacco in the manufacture of cigarettes?
A You mean -- are you asking me what the difference is between casings versus flavorings?
Q No. Are they two different things?
A Yes, they are different things.
Q Are they both contained on that list that's provided to the government?
A Yes, they are.
Q And why is that list so large?
A Well, because the vast majority of those ingredients are flavorings. Flavorings by their nature, there's a very large number of them. If you buy like a pack of Lifesavers, for example, that's multi-fruit, that has cherry and lemon and lime and orange, the flavor that makes up those flavors in the

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candy has actually very low levels, but quite a large number of ingredients used at extremely low levels.

So the flavor -- the flavor industry, by its very nature, has many, many, many ingredients and so does food, for that matter. If you bite into an orange and taste it, there are literally hundreds and even thousands of individual substances that are contributing to that overall sensation that you get when you eat that orange, the overall flavor and taste sensation.

Q Let me hand you, Dr. Appleton, Plaintiffs' Exhibit 66. Is that a version of this list of ingredients we've been talking about?

A Yeah. This is actually the list. This is the list of ingredients that were added to cigarettes that were manufactured by the six major U.S. tobacco companies in 1993.

This list was made available to the public in 1994 and contains every ingredient that was added to tobacco in the manufacture of cigarettes during that time frame by the six major U.S. tobacco companies. And this was -- I think this is on the Internet.

Q Does it also contain a reference to where those ingredients and flavorings are used in other foods?

A Yes. For example, here's one acetic acid. That's found naturally in bananas and beer and beef, and apple juice, apricots, blue cheese, blueberries and so on. I mean, most of these things occur naturally in foods and tobacco.

Q And finally, Dr. Appleton, was an independent panel of toxicologists asked to take a look at that list?

A Yes. An independent panel of toxicologists was asked to review this, and they also reviewed not only the external literature concerning the safety and acceptability of these, but also internal research that have been conducted by the tobacco companies, and from that review came to a view as to their acceptability. And they concluded that these ingredients are safe as they're intended to be used in cigarettes.

MR. OHLEMEYER: That's all I have. Thank you, Your Honor.

THE COURT: Mr. Motley, any

follow-up.

MR. MOTLEY: Judge, I've got five minutes, but I don't want anybody to get mad at me about their dinner getting cold.

THE COURT: Go ahead. I'd like to finish with this witness.

MR. MOTLEY: Your Honor, I renew my motion to be allowed to use the McDermott

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memo in light of the last answers from this witness.

THE COURT: What was the document, Counsel?

MR. MOTLEY: The one we had such discussion about yesterday, 20371. Mr. McDermott's memo about additives.

MR. WAGNER: We need to approach, Your Honor.

THE COURT: Yes.

(Bench discussion)

THE COURT: All right, Mr. Motley.

RECROSS-EXAMINATION

BY MR. MOTLEY:

Q Dr. Appleton, do you have the study, the report from the International Agency for Research Against Cancer handy? Page 76.

You have that handy?

A Yes, sir.

MR. MOTLEY: Your Honor, I'd like to use this in a fashion that the jury can look at it but it doesn't go into evidence, that we've been using it for demonstrative purposes.

MR. OHLEMEYER: Your Honor, I'm not sure I understand the procedure here.

MR. WAGNER: What is it we're doing?

MR. MOTLEY: Showing the jury the study that he just relied on.

MR. OHLEMEYER: I don't have any objection about Mr. Motley asking him questions about it but --

THE COURT: You can show it as demonstrative.

Ladies and gentlemen, this is not evidence. This is shown to you as demonstrative, upon what he based his earlier testimony, so it's not evidence.

Q The page 76 is the one I'm going to ask you about. It's in the top left-hand corner. And we're talking about Study 3.7.2;

correct?

See that number right above?

A Yes. That's the section where the study is described.

Q And the first, very first sentence in this -- this is the World Health Organization International Agency for Research Against Cancer Study; right, that you were talking about with 650 people, sir?

A Yes. Yes.

Q Yes? The second largest in the world; correct?

A Yes.

Q Does not the very first sentence, sir, after the authors are listed say, "Environmental tobacco smoke is a likely cause of cancer"?

A Yes, and they cite two references.

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Q Excuse me, sir. Can you answer my question yes or no?

MR. WAGNER: Judge, you know, I think it's improper to pose a question to the witness and not give him a chance to explain the answer.

MR. MOTLEY: I didn't ask him to make a speech.

THE COURT: He can answer yes or no.

Q I asked him a simple question. Does it say that or not?

A Yes, it does say that. That's not the whole sentence.

Q Well, you read the rest of the sentence, "while evidence of an association with other neoplasms" --

That means cancer other than lung; right?

A Right.

Q All right.

A "Is inconclusive."

Q You understand this is claimed to be a lung cancer?

A Yes.

Q All right. Now, it gives two footnotes, doesn't it?

A Yes, it does.

Q One of them is Footnote 37; correct?

A Yes.

Q Would you turn back to Footnote 37, folks, please, and Doctor.

A I don't know if those footnotes are on my

copy.

Q Well, let me give you one that's got it. Maybe it doesn't.

A All right.

Q You see Footnote 37, sir?

A Yes.

Q Okay. And I'm going to hand you a copy of a journal called Lancet. Confirm for me that that's the article they're referring to.

A It appears to be.

MR. MOTLEY: Your Honor, for the same demonstrative purposes, I would like the jury to see this footnote.

MR. OHLEMEYER: Your Honor, over my objection, I don't think it's --

MR. WAGNER: Objection, Your Honor, it's hearsay.

THE COURT: Wait a minute. I'm going to decline that as a demonstrative exhibit.

MR. MOTLEY: Can I ask him if he can confirm for me what it says without showing it to the jury?

THE COURT: Well, you asked him if that was the -- why do we need to get into

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the basis or the facts of this particular article?

MR. MOTLEY: Because, Your Honor, it's a footnote that's cited for --

THE COURT: I understand that, but I don't think we need to get that far.

MR. OHLEMEYER: It's a letter to the editor, Your Honor. It's not an article.

BY MR. MOTLEY:

Q Well, sir, can you confirm that that's exactly what was cited in there?

A It appears to be.

Q And when the World Health Organization puts out an article, they interpret the article themselves, don't they?

A I suppose they may have various approaches. I can't say yes as a general proposition. They may.

Q Well, they interpret their own data, don't they?

A I assume they do.

Q Yes. Are you aware of this document, sir, that interprets the study you just interpreted for the jury?

A No, I'm not aware of this.

MR. MOTLEY: I'd like to mark that, Your Honor.

THE COURT: We'll have it marked.

MR. MOTLEY: Your Honor, I have no further questions.

THE COURT: All right. Thank you, Counselor.

Doctor, I believe that concludes your testimony. Thank you very much.

THE WITNESS: Thank you.

THE COURT: You may step down. We'll take the noon break, ladies and gentlemen. We'll start again at 1:15. Remember, don't discuss the matter among yourselves. You may go with the bailiff.

MR. CASSELL: All rise.

MR. MOTLEY: Are we going to have a hearing, Judge?

THE COURT: On the rebuttal matters?

MR. MOTLEY: Yes, sir.

THE COURT: All right.

MR. MOTLEY: You had said something yesterday. I didn't know if you wanted to

do it now.

THE COURT: Let's see where we are here with some motions. We're still on the record.

MR. MOTLEY: Your Honor, did you get an opportunity to look at the bench brief that we filed on the scope of rebuttal?

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THE COURT: I looked at the bench brief from both sides. Now I have proposed rebuttal experts.

MR. MOTLEY: Yes, sir, and excerpts. You should have excerpts from the testimony that we believe these experts would reasonably --

THE COURT: I do.

MR. MOTLEY: I think -- I'm sure we gave counsel a copy of it.

THE COURT: Actually, I have not read the testimony that's submitted, so it probably would not be beneficial to conduct any hearing on these rebuttal witnesses.

MR. MOTLEY: Okay.

THE COURT: How many rebuttal witnesses to you intend to have in total?

MR. MOTLEY: Your Honor, we listed three.

THE COURT: That's all?

MR. MOTLEY: Yes.

THE COURT: That's a question.

MR. MOTLEY: Yes, Your Honor, that is all.

THE COURT: All right.

MR. MOTLEY: And I did answer yes or no.

THE COURT: Now, I also have the document, Plaintiffs' Objection to Defendants' Designations of Philip Wiley Deposition.

First of all, does the defense intend to offer evidence on the deposition?

MR. OHLEMEYER: Your Honor, what I would intend to do today is to read a portion, a few pages of the deposition -- I want to admit some evidence, read a few portions of his deposition. I want to publish a small subset of the evidence I admit, and then I want to put the next witness on, Dr. Hoff.

At a later point in the case, either

today or more likely on Monday, I would like to read the remainder of our previously designated portions of Mr. Wiley's deposition. I can give Your Honor a copy of what we intend to read. I think the objections are basically framed in two -- in two bases.

One is that because there was testimony in the plaintiffs' case on this issue, that we should be precluded from reading these admissions from a party in our case. And I think it's proper for us, in our case, for a variety of reasons, including the fact that we have the burden of proof on one or more issues, to sponsor admissions of Mr. Wiley through the form of his deposition in our case as part of our evidence. That's what

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we'd like to do.
THE COURT: I have not seen your designations yet, Counselor.
MR. OHLEMEYER: I will leave them with you on my way out. I've got them right here.
THE COURT: Assuming you get out.
MR. OHLEMEYER: I've got them right here.

Then the other thing I'd like to do, Your Honor, before we put the witness on, is move a set of exhibits into evidence. They are all very similar, I think. If there are objections, I think we can deal with them as a group. These are articles from newspapers and magazines that fall into a couple of different groups.

They are -- the majority of them come from newspapers and magazines that Mrs. Wiley has claimed to have read during her lifetime, some others come from other newspapers or magazines. They are offered for a number of reasons: One, on the issue of consumer expectations. They are circumstantial evidence of what consumers knew or could have known about certain subjects.

Two, they are offered as circumstantial evidence of Mrs. Wiley's state of mind and knowledge and experience, which goes to the issue of incurred risk. And they're not being offered as, for the truth of the matters stated therein, although most of

them are ancient documents and would come in over a hearsay objection.
THE COURT: Plaintiffs aware of the documents sought to be admitted?
MR. MOTLEY: Yes.
THE COURT: All right.
MR. MOTLEY: Yes, we are.
THE COURT: Are there objections?
MR. MOTLEY: Yes, Your Honor, we object to them. We don't believe there's any -- he's not cited a single rule that would allow magazine articles be allowed into evidence. These are not magazine articles found in the possession of the plaintiff, Mrs. Wiley, or her husband, Mr. Wiley. These are articles that they had some historian go fetch out of a library somewhere.
THE COURT: There is evidence in the record regarding what articles she read or in deposition testimony?
MR. MOTLEY: No, sir. There's evidence in the record that she may have read at one time or another a Reader's Digest. He wants to leap from that to come

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in with specific Reader's Digest articles.
Now, if there is one specific article to which he refers that she said she, in fact, read, then I may have to retreat as to that document.
But as a general proposition, what he wants to do here is say Mrs. Wiley subscribed or read from time to time maybe a magazine here or there of Reader's Digest, and then from that leap into the assumption that she read the specific ones in question. He's got to do more connecting than that.
MR. OHLEMEYER: No, Your Honor. Here's what I'm doing. One is consumer expectations. There's an issue in this case as to consumer expectations.
THE COURT: I agree.
MR. OHLEMEYER: There has been evidence put in by the plaintiffs, a large amount of it, that goes to that issue: Advertisements -- in fact, they've even put newspaper, magazine, press release articles in. In fact, they would have the jury do the same thing because a medical journal published an article, the jury should infer

that the defendants read it, reviewed it, relied upon it, acted upon it. That's an argument we're going to hear over the course of six hours maybe. That's the issue of consumer expectations.
I think any of this information, to the extent it relates to cigarette, cigarette smoking, the issues that have been presented to this jury is admissible as circumstantial evidence of consumer expectations.
THE COURT: That's issue one. Now what about Mrs. Wiley?
MR. OHLEMEYER: Mrs. Wiley, there is evidence, I will read, and intend to read to the jury, that Mrs. Wiley subscribed to newspapers, including the Indianapolis Star, the Reader's Digest, Newsweek, a journal called RN, Registered Nurse, and even perhaps the Journal of the American Medical Association, throughout the course of their marriage.
MR. MOTLEY: Oh, no. That's not true.
MR. OHLEMEYER: That's what it says.

THE COURT: What are you reading?
MR. MOTLEY: That's a blatant misrepresentation.
MR. OHLEMEYER: His deposition.
THE COURT: Whose deposition?
MR. OHLEMEYER: Mr. Wiley's.
THE COURT: Get that on the record.
MR. OHLEMEYER: I'm sorry. So the

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fact of the matter is, as circumstantial evidence of what she could have known, anything that was published in Indiana during that time period, I think, would be relevant and probative to that issue, but more specifically, anything from a magazine that her husband says she read or, during the course of her marriage, makes it even more probative, and it's all offered as circumstantial evidence on those issues.

THE COURT: All right.

MR. MOTLEY: Your Honor, let me address the general condition first. Counsel has not cited you one hearsay exception that would allow him to bring in through a historian-sponsored person, that's the subject of the Hoff motion we filed.

THE COURT: I saw that.

MR. MOTLEY: To have her come in here and say she went and collected up all these articles about Reader's Digest -- and he misrepresented, blatantly I might add, what Mr. Wiley said about these various subscriptions in the time frames given for some of these things, number one.

But even if she subscribed to something, and he was able to prove the date that she had that subscription, how do we leap from there to the assumption that she read it, okay?

But as a general proposition, Your Honor, there is no -- there's a big difference here between an ad, which he likened this to, that a defendant pays for, it's got its name on it and its product on it, that is an admission against interest of a party.

To come in with a Reader's Digest that somebody harvests up at a library, with no foundation whatsoever that this women ever saw, read, or understood it, is a great leap backwards through circumstantial evidence,

posits and logic. There's no way that he can connect her up to this.

Now, if Your Honor decides to allow Dr. Hoff, Professor Hoff, whatever she is --

MR. OHLEMEYER: This has nothing to do with Professor Hoff, Your Honor. I'm trying to save the Court some time.

THE COURT: How does this relate to Hoff?

MR. MOTLEY: Because Hoff is going to come in and claim that everybody in the world knows that cigarettes cause lung cancer; of course, except for the defendants. Everybody knows that it causes lung cancer because she's gotten this great body of information from a public library. That's what our motion is about.

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If Your Honor decides that she is, in fact, able to give testimony in this case, then I would think under Rule 703, if these are the type things she normally relies on, she can refer to them. But they sure don't go into evidence. Under Rule 703 the underlying data, that underlying data is inadmissible. There is no rule here, Your

Honor. There is no rule here that these old magazine articles come into evidence.

He cited you none. There is none. I would like to hear the rules that he claims allows him to give the jury and take back to deliberate a Reader's Digest article in 1953, notwithstanding the fact that there's no evidence in this record, none whatsoever, that in 1953 she read that article.

This is not like, Your Honor, if you took Mrs. Wiley's deposition before -- if that had happened, and they gave her this Reader's Digest article and asked her had you seen that and she said yes -- maybe, yes, I did. That would be some circumstantial evidence. But to say that at some point in her career, in her life, she read Reader's Digest, you've got to connect up the next dot. That comes out 12 times a year, and prove that she more likely read that particular document or not, not just that generically she looked at Reader's Digest.

There's a big difference between the Reader's Digest article being found in the

defendants' files, okay? And it's an ancient document, then it's admissible. This is not found in any files of Mr. Wiley or Mrs. Wiley. So he has not made that connection between the article itself and the plaintiff in this case.

Again, Judge, under 703, he may be entitled, if you allow this witness to testify, for her to say I've looked at them, but they are not entitled to take that back to the jury room, no more than a learned treatise is allowed to be taken back to the jury room.

MR. OHLEMEYER: Mr. Motley still has a misapprehension. Dr. Hoff's testimony as an expert is going to be based on her foundation, and it's going to deal with common knowledge. That's an issue in consumer expectations. The issue of whether these exhibits are admissible as evidence is 401 and 402. And the question is, what do they tend to prove. And if there are -- if there is evidence or articles in newspapers or magazines or journals that the ordinary consumer had access to over the relevant

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time period of this case, which in Mr. Motley's estimation is the beginning of time forward, that evidence is probative. It is circumstantial evidence of what a consumer could have expected.

With respect to Mrs. Wiley, and her -- the issue with incurred risk, what is published in magazines during time periods where she was either reading or, even if you want to take the next step, because we're not that far removed, if it were available to her, these are magazines that according to her husband's deposition they either read or subscribed to during the course of their marriage.

THE COURT: During the relevant period of the articles?

MR. OHLEMEYER: Yes, yes. That is circumstantial evidence of issues that have to be said to the jury. The reason we have six hours to argue this case is for Mr. Motley to claim that there is no such connection, and it didn't come from the Wiley house. That's all an argument that goes to weight, Your Honor. These tend to

prove the issue of consumer expectations on the one hand and incurred risk or knowledge and experience on the other hand.

MR. MOTLEY: Now, here's what he wants. Here's a great leap. In the deposition he asked if he subscribed to Newsweek.

He said, "Over probably a ten-year span, I just don't know for sure. It could have been longer, it could have been shorter."

Then he asked him about Reader's Digest. He said, "four or five years.

"Did she typically read or at least glance at Reader's Digest?

"Yes."

But what four- or five-year period are we talking about? We don't know. He didn't ask.

So now we don't have the ability to connect up this stack of Reader's Digests to her. So we can't be giving this jury Reader's Digest when he hasn't -- it's his burden here, not mine. He's got to prove -- he's got the burden of prove on incurred

risk. He's got to prove, Judge, that this lady had an opportunity to read magazine A. And he has not done it. He cannot do it.

THE COURT: What about the year argument?

MR. OHLEMEYER: The year argument goes to consumer expectations, Your Honor.

MR. MOTLEY: What is it?

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MR. OHLEMEYER: If any consumer, if this stuff was out there, then people had access to it. So this is a weight argument. It tends to prove what the consumer's expectations about this product were.

With respect to the years, the testimony is a little broader than that. She liked to read newspapers each morning, took the Star most of their marriage, yes, sir. Magazines, Newsweek and medical nursing magazines, any others? Sports magazines, read Newsweek each week, cover to cover, yes. How long did you subscribe? Over probably a ten-year span. I just don't know for sure. Could have been longer, it could have been shorter. The whole time you lived on West 10th Street you took it? Most

of the time I'd say so. What about Reader's Digest? Did you start taking it at the time you lived on West 10th? How long did you take it? For four or five years. Then RN, she said she read the entire time she was in nursing.

So the specific magazines, if all this were being offered to -- were Mrs. Wiley's issue, I think there is a connection -- there's more of a connection, I think, than would be necessary as a foundation for their admissibility on that issue. The attenuation or the lack of connection is a weight argument that Mr. Motley has six hours to make. With respect to consumer expectations; however, Your Honor, the Court, I'm sure, is going to instruct the jury on consumer expectations, and this is all circumstantial evidence of consumer expectations.

MR. MOTLEY: Consumer expectations, Your Honor, is a subjective rule in Indiana, not an objective one, in the Corbin Industries case. Getting back to this issue here --

MR. OHLEMEYER: You misspoke. It's an objective standard. Consumer expectations is an objective standard.

MR. MOTLEY: Mr. Cross tells me what it is. I don't know. I'll let Mr. Cross argue that.

Let me get back to this for one second, if I might.

THE COURT: Go ahead.

MR. MOTLEY: And close the loop here. He said he took Reader's Digest for four or five years. He lived on West 10th Street the last six years of her life. These questions are focused on West 10th. The last six years of her life is from 1985 to 1991. He wants to use that testimony to bring a stack of 1950s' Reader's Digests in

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here.
Now, Judge, if he had the chance to ask the man the questions to focus more on time so he could get them in here, he didn't do that. When I bring a document in here, Judge, I'm required to, and you've required me to, and rightly so, to prove that it came from their files. There is no such proof

here, this is -- this is like the Chinese cultural revolution. This is a great leap forward here. He's trying to jump from the fact that there's such a thing as a Reader's Digest to the fact that this women read it --

MR. OHLEMEYER: Let's back up for a minute, Your Honor.

MR. MOTLEY: -- when the only testimony here, Judge, is about West 10th Street.

MR. OHLEMEYER: Let's back up. Here we've got a witness in the box who is given a document that was created 12 years before he gets to a company, by people he doesn't know, about a subject he doesn't come to court and testify about, and Mr. Motley argues it's probative of something. That's the whole point. He's made a weight argument for 15 minutes.

MR. MOTLEY: That's an admission, my argument --

MR. OHLEMEYER: Consumer expectations, Your Honor, is one ground for admissibility of this, and it is a very

broad ground in terms of time and scope. An additional ground is an issue with respect to --

THE COURT: How many articles do you have?

MR. OHLEMEYER: Couple dozen.

MR. MOTLEY: Now, he gave us a much longer list than that.

MR. OHLEMEYER: No, that's not true, Your Honor.

MR. MOTLEY: Is this all you're offering?

MR. OHLEMEYER: Yes, this is exactly --

THE COURT: The short answer is, he can do it. In fact, when I was thinking about this case early on, I figured this would be offered and thought about this earlier. But he can do this, what he's proposing regarding the articles, and I think your arguments generally go to the weight, Mr. Motley.

MR. MOTLEY: In other words, he's going to be able to admit a Reader's Digest article dated 1953 when the testimony is

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that they didn't even read it until 1985. That's all I'm asking, is that what he's going to be allowed to do, Judge?

THE COURT: Is that a jury argument you're making?

MR. MOTLEY: No, sir.

THE COURT: I have ruled on these articles that I have reviewed, and I'm going to permit him to do that because Mr. Ohlemeyer is correct on why they are being offered. Now, they have every right to do that.

The motion on the testimony of Joan Hoff, motion to exclude her testimony is denied. We'll be back at 1:30.

MR. WAGNER: Quick question, Judge. On Your Honor's ruling on instructions, I think you said we could -- both sides could file ten more?

THE COURT: Ten more.

MR. WAGNER: Is that in addition to the ten already filed?

THE COURT: Yes. Actually 15 have been filed on behalf of some parties.

MR. WAGNER: Yes. I think we filed

14, plus we suggested some of the --

THE COURT: I understand that.

MR. WAGNER: So we can file ten more in addition to the 14, which I think is what we filed?

THE COURT: That will be fine.

MR. WAGNER: One more quick subject. If we are withdrawing an instruction, can we then substitute a new instruction for that? We filed 14, and because maybe some of the evidence has shifted around a little bit, can we delete one of those 14, and can we insert one in its place?

MR. MOTLEY: Can we get two drafts?

THE COURT: I think 25 is -- what you ended up with is 25 instructions. As I looked at your page, I think there were several patterns, which I'm going to use it anyway. So I'm not counting those as each additional number. If someone needs to go one or two over, I don't care. I don't care that for the plaintiff or for any of the defendants. I just want to get in the ballpark of 25.

MR. WAGNER: Thank you, Judge.

MR. MOTLEY: Judge, he wants to read some of Mr. Wiley's testimony before Dr. Hoff testifies? He just wants to read this page here?

MR. OHLEMEYER: Yes, I just want --

THE COURT: Before Hoff testifies?

MR. MOTLEY: I don't have any

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problem with it. He just told me what page he wanted to read.
MR. OHLEMEYER: The rest we will read on Monday.
MR. MOTLEY: Now, Judge, we've got some objections to what he wants to read on Monday, but we'll address those later.
THE COURT: I want to talk about that further anyway on the deposition of Wiley.
MR. MOTLEY: You said you want to talk?
THE COURT: I do want to talk about that before we get any -- do you intend to offer any of that today?
(Bench discussion)
THE COURT: I'm going to allow the

articles, but I'm telling you, by doing this, I'm not saying that we're going to go any further into the deposition. I will allow you to do the deposition about the articles today.
MR. OHLEMEYER: I understand.
THE COURT: But it is unusual to want to do a deposition when the witness has already testified and been cross-examined vigorously.
MR. OHLEMEYER: I understand that. And that's their objection, I understand.
THE COURT: I'm leaving that matter open, so everybody understands. Because I'm not sure we're going to do that.
MR. MOTLEY: We're not waiving anything by --
THE COURT: Not at all. This is only going to foundation.
Let's take until 1:30, and I'll tell the jury.
(A lunch recess was taken.)
THE COURT: Thank you. Be seated.
Jury is not present.
A matter to come to talk about,

Counsel?
MR. MOTLEY: Yes, Your Honor. I apologize at the start here because, obviously, I got slipped a note from the back in the middle of my argument and misinterpreted what it said and I wanted to clarify.
THE COURT: Okay.
MR. MOTLEY: Your Honor, we believe that the strict liability standard in your state, and we've cited cases to this effect, but unreasonably dangerous product refers to a situation which the use of a product exposes the user or consumer to a risk of physical harm to an extent beyond that contemplated by the ordinary consumer, with the ordinary knowledge about the product's

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characteristics, comments of the community of consumers.

Your Honor has ruled that stuff can come in with Dr. Hoff, and I understand that. Here's what -- I got screwed up here, if I can use that word. I thought Mr. Cross had sent me a note that dealt with what I just read to you. But that's not what he

sent me a note about. And during the lunch break, Your Honor, I read these cases. The second -- you know, Mr. Ohlemeyer offered that on two grounds. The first was what I just read, common knowledge.

THE COURT: Right.

MR. MOTLEY: And the other was on incurred risk. And I got all sidetracked, so I wanted to make sure that I made my point clear. I understand Your Honor's ruling on common knowledge. I ain't revisiting that.

THE COURT: Okay. I'm glad you cleared that up.

MR. MOTLEY: I think that this evidence does not come in on her incurred risk for the following reason: Number one, it requires a mental state of venturousness, I'm quoting, and a conscious, deliberate and intentional embarkation upon the course of conduct with knowledge of the circumstances. The defense contemplates acceptance of a specific -- specific risk of which the plaintiff has actual knowledge. The plaintiff must have actual knowledge and

appreciation of the specific data, actual knowledge, resort to an objective standard.

This is 1990 Supreme Court and the first one was 1997.

Resort to -- if your supreme Court -- to an objective standard. What does she actually know? Not what she could have found out. To determine what a product user should have seen and known about a product danger is further inappropriate. In other words, it's inappropriate to say what they could have found out and what they should have known. You've got to prove what they did know, actually knew, because such application of the rules, they want to try to say she got the magazine, she should have read it, that's subjective, okay?

Your incurred risk is like modern-day incurred risk. It's a pretty strict burden. That's -- the thing that separates strict liability from negligence in most states is you don't have contributory negligence. She should have known, she should have found out. It is she did know, and nevertheless, knowing the specific appreciation of the

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specific risk, she nevertheless went ahead and encountered it voluntarily. So that is objective.

Your Court has said it would be inappropriate, 1990 Cosck vs. Townsend Engineering Company. Resort to an objective standard to determine what a product user should have seen and known about a product is further inappropriate, because such application of the rule is akin to contributory negligence defense which is not available under strict liability and tort.

So, Your Honor, we're not -- we're asking that, just like you do with the medical article, when you let the jury look at a medical article, you tell them this is not in evidence. I understand it's going to be in evidence, but on the issue of common knowledge. It should not, and the jury needs to be told, that is not evidence of what she actually knew, these articles.

THE COURT: I see your point.

MR. OHLEMEYER: My point, Your Honor, is the only way I can prove which she actually knew is circumstantially. We don't

have the testimony of her.

MR. MOTLEY: You can't prove actual knowledge by circumstantial evidence.

THE COURT: Well, I thought over the -- go ahead. I'm sorry.

MR. OHLEMEYER: At the end of the case I have to argue that based on her background, based on her knowledge, based on her training, based on what information was available to her, she did or didn't know something. I mean, the only way you can prove some of the stuff is circumstantially.

THE COURT: Does it also go to the conspiracy allegations?

MR. OHLEMEYER: It also goes to common knowledge on ETS. So this evidence -- if there was not even an issue in this case about Mrs. Wiley or incurred risk, this evidence would all go on common knowledge.

MR. MOTLEY: I dare to dispute that. I just said --

MR. OHLEMEYER: To the extent --

MR. MOTLEY: You can't let it in on that basis.

MR. OHLEMEYER: To the extent there is a defense of incurred risk in this case, this is circumstantial evidence of what Mrs. Wiley knew. To the extent that you can argue or prove that there are things that -- there is knowledge in sources that were available to her and read by her.

THE COURT: I think -- I may not

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have understood completely your argument this morning, Mr. Ohlemeyer. I'm not sure it goes to incurred risk. I'll buy into the argument that it goes to what documents were out there during that particular period of time. That's fair. That's fair.

MR. OHLEMEYER: This witness --

THE COURT: I think it also goes to conspiracy, under his allegation.

MR. OHLEMEYER: Certainly.

THE COURT: But I don't think it goes specifically to incurred risk.

MR. OHLEMEYER: I haven't argued that it does.

MR. MOTLEY: You just finished arguing.

THE COURT: You did a minute ago.

MR. OHLEMEYER: Because Mr. Motley keeps thinking that this witness -- this has nothing to do with the witness' testimony.

THE COURT: I understand.

MR. OHLEMEYER: But to the extent there is information in magazines or newspapers that Mrs. Wiley -- the jury finds were read by Mrs. Wiley during the appropriate period of time, I think at the end of the case, it would be an appropriate argument, but that is evidence they can consider in determining whether she understood and appreciated the specific risk that Your Honor is going to instruct.

MR. MOTLEY: My argument is not a weight argument, Your Honor. Mine's a personal argument.

THE COURT: I understand.

MR. MOTLEY: It's blatantly unfair to allow them to bring this in, and I'm not rearguing with you about that, but to allow him to come in there and let him then stand up and argue it that somehow -- now he's got the burden to proof, not me, Judge. This is not a weight. This goes -- we would ask for

a 105 instruction here that this evidence comes in on the duty of the defendant, not on the duty of the plaintiff; because there is no way, Your Honor, that he can make an argument that she actually knew anything in any one of those documents, with due respect, Your Honor. Your rule is the same as the rule in my state. It is manifest, Judge, it's manifest error to allow them to make an argument about a standard of actual knowledge, Judge. That's a pretty tough burden. Actual knowledge is a tough burden, and they ain't met it.

MR. OHLEMEYER: Here's my point, Your Honor. Mr. Wiley testified that he and his wife believed that exposure to smoke was (inaudible.)

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MR. MOTLEY: He can argue that.
THE COURT: Go ahead.
MR. OHLEMEYER: What Mrs. Wiley -- what the jury can consider on the issue of incurred risk is something you're going to instruct them on. What we can argue fairly on the evidence is something you're going to instruct them on. There is evidence in --

this evidence can be argued on a number of points, not the least of which has to do with exposure or the existence of exposure and, circumstantially, how she reacted to exposure or what she would have done if she would have been exposed.

So I'm not saying that I'm going to stand here today or even in closing and say Mrs. Wiley read this, relied upon it and acted upon it. I'm going to say that there is evidence in the case in which the jury has to decide what consumer expectations are, what the effect of this so-called conspiracy is, and what Mrs. Wiley may have known or not known.

MR. MOTLEY: Now, wait a minute.
THE COURT: Let him finish.
MR. OHLEMEYER: And use that to decide whether her behavior or her actions or her dealings at work suggest it is more or less likely than not she was exposed to as much ETS as these people say she was. I think Mr. Motley misperceives my argument. I'm not going -- I agree, I'm not going to agree that Mrs. Wiley had actual knowledge

of these articles. I'm going to argue that this evidence, like her employment evaluations, like the testimony of her co-workers, like the testimony of Mr. Wiley is all evidence the jury has to consider in determining whether the plaintiffs have proved the things they have to prove in this case.

MR. MOTLEY: May I respond, Your Honor?
THE COURT: I think -- I'm going to tell this jury two things. This evidence is admitted only on these two points: Number one, that these articles were out there in the public domain during at least a part of the relevant period, number one.

Secondly, these articles may be considered by the jury in terms of plaintiffs' conspiracy allegation and whether or not information was kept from the public. I think those are relevant inquiries on these particular articles. And I don't think we'll go any further than that.

MR. MOTLEY: You're not going to

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argue incurred risk out of these documents?
THE COURT: Well, we'll revisit that at the final argument, but that's what I'm going to tell them today.
MR. MOTLEY: Judge, I understand that. What you just said is fine. I'm just saying, Judge, there is no way that this gentleman can stand up here and argue that those documents, Reader's Digests found in a library at the University of Indiana prove her actual knowledge.
THE COURT: That would be Indiana University.
MR. MOTLEY: What did I say?
THE COURT: University of Indiana.
MR. MOTLEY: Did you all win, Judge?
THE COURT: Yes, we did. Is South Carolina still in it?
MR. MOTLEY: We got cheated.
MR. OHLEMEYER: This is the subset that I want to publish, and all I want to publish is the headline and the date.
THE COURT: That's fine.
MR. MOTLEY: Wait a minute, Judge.

If he's going to --
MR. OHLEMEYER: That's my question.
THE COURT: I was going to ask you how much of this did you want to publish?
MR. OHLEMEYER: Under Rule 106, it seems to me, that if all I'm reading is the headline and the date, fairness doesn't require the text or the substance of the article to be read.
MR. MOTLEY: Judge, he wants to stand up here -- now let me get this straight. He wants to stand up here and read a headline that says --
THE COURT: He can refer to it. Is that your question?
MR. MOTLEY: Yes.
THE COURT: You put it in, he can refer to it.
MR. OHLEMEYER: I understand that, but in terms of publishing right now, if all I'm doing is reading the headline, I don't know that Rule 106 requires that the rest of the article --
MR. MOTLEY: We want the whole article read to the jury, Your Honor.

MR. OHLEMEYER: I think that is --
THE COURT: In terms of keeping this thing moving, I'm not going to do that with all these articles.
MR. MOTLEY: Judge, he's just going to stand up and read four sentences out of a 5,000 word article. How is that fair?
MR. OHLEMEYER: Headlines.

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MR. MOTLEY: Excuse me. Eight words out of a 6,000 word article. How is that possibly -- Rule 106 is exactly designed for that. He wants to read some sensational headline and not any of the substance. The reason they don't want to read the substance is because in the substance of it, the cigarette companies are saying it ain't so. That's why he don't want to read the whole thing and that's what makes it, in fairness, relevant to this issue. He wants to read a headline --

MR. OHLEMEYER: Let's put it this way, Your Honor. If there is a statement in what I want to read that says the cigarette companies say it ain't so, or thereabouts, I have no objection to Mr. Motley reading

that. But I don't think Rule 106 compels the reading of the entire portions of articles if all I --

THE COURT: I'm not sure it does either. You don't want to read the entire article?

MR. MOTLEY: I guess I don't.

THE COURT: No. Once those are admitted --

MR. OHLEMEYER: I understand that.

THE COURT: If there are snippets that he wants to read, I'm going to let him, but we're not going to sit here while we read 15 or 20 articles cover to cover.

MR. OHLEMEYER: I've got notebooks. All I want to do is publish the date and headline.

THE COURT: All right.

MR. MOTLEY: Judge, when is it appropriate for me to then ask for a 105 instruction that this doesn't come in on incurred risk?

MR. OHLEMEYER: The jury hasn't even been instructed on that.

THE COURT: No, I haven't.

MR. MOTLEY: I understand that, Judge, but it's pretty hard to stop somebody in a closing argument, and you've already heard Counsel on one hand says he ain't going to argue it and on the other hand --

THE COURT: My suggestion would be one of these learned Counsel back here draw an instruction to cover that at the final.

MR. MOTLEY: I will.

MR. OHLEMEYER: As a matter of housekeeping, Your Honor, do you want me to read into the record these exhibit numbers or give the Court an exhibit with the numbers on them?

THE COURT: You can just read it into the record. That's fine.

MR. MOTLEY: Judge, do you have a

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particular learned Counsel in mind? I've been looking for one for about five weeks.

THE COURT: I'll defer to your judgment.

MR. OHLEMEYER: I don't want to --

THE COURT: You can just read them into the record. You're offering?

MR. OHLEMEYER: I'm offering --

THE COURT: Wait until Mitch gets with us here.

MR. OHLEMEYER: I'm offering Defendants' A1, A5, A6, A7, A8, A17, A23, A26, A27, A32, A60, A73, A76, A111, A115, A126, A137, A147, A190, A202, A221, A228, A242, A262, A264.

THE COURT: Wait a minute.

MR. OHLEMEYER: I'm sorry. I'll give you the list too. A221, A228, A242, A262, A264, A353, A365, A370, A371, A381, A382, A385, A386, A387, A388, A389, A390, A392, A407, A408, A418, A438, A441, A442, A469, A530, A555, A600, A603, A617, A634, A641, A648, A677, A680, A689, A690 -- I'm sorry? It's B677, B680, B690, B693, B740, B741, B756, B853, B860 B864, B1791.

THE COURT: Court has considered the arguments of Counsel. Those will be admitted for the limited purposes as stated in the Court's instruction.

After that is completed, Mr. Ohlemeyer, who is your next witness?

MR. OHLEMEYER: Dr. Joan Hoff.

MR. MOTLEY: Judge, can I ask a

question? I don't have to -- when you just admitted it, I didn't have to stand up and say --

THE COURT: I noted your objection.

MR. MOTLEY: Okay. Thank you.

MR. CASSELL: All rise.

THE COURT: Be seated. All right. Jury back in its entirety.

Ladies and gentlemen, in your absence, certain exhibits have been offered by the defense, Mr. Ohlemeyer, regarding articles and things of that nature that have appeared in the past in magazines and in newspapers. I have admitted those articles.

And I want to tell you at this point they have been admitted for two reasons: First of all, these articles have been admitted to demonstrate to you that during, at least part of the relevant period of inquiry here, that these articles were in the public domain.

Secondly, they have been admitted regarding the plaintiffs' conspiracy allegation in terms of whether or not information was, in fact, kept from the

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public by any of these defendants. So they have been admitted only on those two bases.

And do you care to publish, Mr. Ohlemeyer?

MR. OHLEMEYER: Yes, I do, Your Honor.

THE COURT: All right. We have -- we'll pass out the articles that have been admitted on that limited basis, ladies and gentlemen.

MR. OHLEMEYER: Your Honor, Exhibit A5 is an article that appeared in the Sunday, January 12, 1964 Indianapolis Star entitled "I Would Advise Anyone to Stop Smoking Public Health Chief Says."

MR. MOTLEY: I would publish two paragraphs from there, Your Honor.

THE COURT: Do you have any objection if he does that during yours?

MR. OHLEMEYER: No.

THE COURT: Go ahead, Counselor.

MR. MOTLEY: First paragraph, the very first paragraph of the article. "Heavy cigarette smoking is the principal cause of cancer of the lungs and the larynx and a

health hazard so grave that it calls for medical action, a blue ribbon science panel concluded yesterday."

Then on the third column, down at the bottom it says, "The Tobacco Institute took the position that the panel's report emphasized a need for additional research. Institute president, George Allen, said in a statement, 'As Surgeon General Chase pointed out, there's a great deal yet to be known on the subject.'"

MR. OHLEMEYER: Exhibit A26, Your Honor, is an article in the Indianapolis Star, January 22, 1976, entitled "Public Area Specified Smoking Ban Passes In House."

MR. MOTLEY: We don't have anything in addition to that one, Your Honor.

MR. OHLEMEYER: Exhibit A32, Your Honor, is an article from the Indianapolis Star on November 12, 1976, entitled "Smoking Ban Proposal Ready For Council."

MR. MOTLEY: Nothing in addition.

MR. OHLEMEYER: A76, Your Honor, from the Indianapolis Star on February 3, 1978, from House Roundup column, "Limits on

Smoking in Public Approved."

MR. MOTLEY: Which one is that, Mr. Ohlemeyer?

MR. OHLEMEYER: 76.

A111 from the January 12, 1979 Indianapolis Star. "Airlines Ordered to Provide Special Seating Sections for Smoking."

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MR. MOTLEY: Nothing from that.
MR. OHLEMEYER: A126, Your Honor, Indianapolis Star, February 23, 1979, "No Smoking Bill Okayed by House."
MR. MOTLEY: Nothing further, Your Honor.
MR. OHLEMEYER: A147, Indianapolis Star, December 9, 1979. "Most Hoosiers Would Curb Smoking in Public Buildings."
MR. MOTLEY: Nothing further, Your Honor.
MR. OHLEMEYER: Indianapolis Star, April 17, 1984, Exhibit A190. Article, "Smokers Jeopardize Spouses Says Study."
MR. MOTLEY: Your Honor, we would publish the third paragraph of that one.
MR. OHLEMEYER: It's not exactly

what we talked about, but I don't have an objection.
MR. MOTLEY: "Passive smoking is dangerous to the health of the nonsmoker."
MR. OHLEMEYER: Exhibit A202 from the Indianapolis Star, October 22, 1985. "Smoke'em Out: Will Society Segregate its Smokers by 1995"
MR. MOTLEY: We have nothing further for that one, Your Honor.
MR. OHLEMEYER: A353 is a December 13, 1965 article from Newsweek under the column "Management: No No Smoking."
MR. MOTLEY: Nothing from that, Your Honor.
MR. OHLEMEYER: A365 from Newsweek on December 8 of 1975, an article entitled "Minnesota: No smoking."
MR. MOTLEY: Nothing from that, Your Honor.
MR. OHLEMEYER: Exhibit 385 is from Newsweek November of 1979 article entitled "A Tough New No Smoking Law."
MR. MOTLEY: Nothing from that,

Your Honor.
MR. OHLEMEYER: A389 from Newsweek, April 7, 1980, entitled "Beware Smokey Rooms."
MR. MOTLEY: Your Honor, we would publish "Respiratory impairment" in the second column, "The results reported in the New England Journal of Medicine showed a clear-cut relationship between a person's exposure to smoke and his respiratory capacity."
MR. OHLEMEYER: And then the article goes on to say, "whether the damage suffered by the nonsmokers will lead to lung cancer or emphysema remains to be seen."
Exhibit A390, Your Honor, is Newsweek, January of 1981, an article entitled

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"Secondhand Smoke and Lung Cancer."

MR. MOTLEY: Give me one second, Your Honor. We don't have anything to read on that.

MR. OHLEMEYER: A418, Newsweek, April 1988, The Big Apple -- "A Big Apple Anti-Smoking Law, the Latest Measure in a Growing National Trend."

MR. MOTLEY: Nothing to read on that, Your Honor.

MR. OHLEMEYER: A530 from the January 1979 Reader's Digest, "Nonsmokers Kick Back: A no-longer silent majority has discovered its right to fume-free air."

MR. MOTLEY: Your Honor, on the second page of that, I think it's page 40. "World Health Organization medical experts have produced compelling evidence that passive smoking, particularly in close, poorly ventilated spaces such as vehicles, public conveyances, theaters, offices, meeting halls and restaurants, can trigger the variety of discomforting medical problems."

Then, Your Honor, on page -- I've lost my place here. I guess that would be it.

THE COURT: All right.

MR. OHLEMEYER: Exhibit A600, Your Honor, is from the magazine RN, an article entitled "Check Your Cigarettes at the Door, Please."

MR. MOTLEY: Nothing from that.

MR. OHLEMEYER: A603, Your Honor,

from the December 1978 edition of RN. "Angina Patients are at Risk in Smoke-filled Rooms."

MR. MOTLEY: Nothing from that, Your Honor.

MR. OHLEMEYER: A617, Your Honor, from the April 1982 edition of RN. "Patient Concerns Sparks Anti-Smoking Rules."

MR. MOTLEY: Nothing from that, Your Honor.

MR. OHLEMEYER: A634, Your Honor, from the May 1987 edition of RN. "When a Nurse's Smoking Bothers Her Patients."

MR. MOTLEY: Nothing.

MR. OHLEMEYER: And A641, Your Honor, from the September 1989 edition of RN. "We Wanted a Smoke-free Workplace and We Got It."

MR. MOTLEY: Your Honor, if you'll give me just one second.

THE COURT: All right.

MR. MOTLEY: We don't have anything from that, Your Honor.

MR. OHLEMEYER: Your Honor, the defendants call Dr. Joan Hoff.

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THE COURT: Good afternoon. Would you raise your right hand.

DEFENDANTS' WITNESS, JOAN HOFF, SWORN

THE COURT: Would you have a seat right over there, please.

Would you tell this jury your name.

THE WITNESS: I'm Joan Hoff.

THE COURT: Spell your last.

THE WITNESS: H-O-F-F.

THE COURT: You may need to scoot just a little bit closer. Thank you.

DIRECT EXAMINATION,

BY MR. OHLEMEYER:

Q Good afternoon, Dr. Hoff.

A Hello.

Q You are not a medical doctor; right?

A That's correct.

Q You have a Ph.D. in history.

A Yes.

Q And you are here to testify about common knowledge surrounding the practice of smoking.

A Yes.

Q Tell us where you're currently employed.

A I'm a professor of history at the

Contemporary History Institute at Ohio University.

Q And how long have you been at Ohio University?

A Just actually a little less than a year. I taught for a number of years over in Bloomington at IU.

Q How long were you at Indiana?

A About 16 years.

Q And what did you teach in Indiana?

A I taught really U.S. foreign policy, politics, and courses in U.S. Women's History.

Q And what do you teach at Ohio?

A About the same thing.

Q Have you taught at the university level anywhere besides Ohio and Indiana?

A I've taught at a number of universities; Dartmouth, Arizona State, American University, UVA, University of Virginia.

Q Have you been involved in the publication of any journals relating to history or the study of history?

A Yes. I've edited two journals. I co-founded the Journal of Women's History

about ten years ago, and then more recently I've been editor of the Presidential Studies Quarterly.

Q What is the Journal of Presidential Studies Quarterly?

A It's simply one of the specialized academic journals that focuses on anything having to do, however farfetched you might think, with

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the presidency, so that we focus on cabinet members, we focus on policy. But it generally has to be about a particular president, and it can be in any time period.

Q Can you describe your educational background for us.

A Well, I was educated primarily in Montana. I was an undergraduate at the University of Montana at Missoula and then I went on to graduate school at Cornell and at Berkeley in California.

Q And what about post-graduate study; did you have any post-graduate study?

A I did some abroad on Fulbrights, but basically I took statistical studies at the Newberry Library in Chicago, and actually took a few post-doc law courses at one

stage.

Q You said you did study abroad on a Fulbright. What is a Fulbright?

A Named after the Arkansas senator. They're either teaching or research grants that allow you to study or work abroad. And so I had two, one Tour de France very early on in my career, and then most recently I was in Ireland in Dublin.

Q And have you ever had what is known as a Guggenheim Fellowship?

A Yes.

Q What's a Guggenheim Fellowship?

A Again, it's probably I think considered one of the most prestigious grants that you can obtain for research purposes.

Q Are they competitive?

A Yes.

Q What other post-doctorate work or study have you done?

A Basically I've had to kind of train myself in economics, because I do a lot of foreign policy that involves economics. And other than that, it's basically been simply trying to keep up in the fields that I cover, which

are extensive in terms of foreign policy and politics.

Q Give us a general idea of the types of courses you've taught over the years involving history.

A Well, I have, when I first started out, as every young professor does, I taught the survey courses in U.S. History, the first half going up to the Civil War and the half then from the Civil War to the present.

But in -- over the last decade or so, I've mainly taught graduate courses in very contemporary foreign policy and politics, which usually means from the 1920s forward. So I'll teach a class on the modern presidency, for example, and usually from President Roosevelt forward to the present.

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And then I've taught economic foreign policy for the Inter-War years, which means the 1920s and '30s, and then sometimes I'll just teach highly specialized courses on biography; for example, writing biographies of presidents.

Q Have you published any books or articles in your field?

A Quite a few. I've published about a dozen books, but the primary ones have been in foreign policy; three in foreign policy. And then I published early on in my career a biography of Herbert Hoover, and most recently I've published a study of Richard Nixon's presidency.

Q Have you also published on the subject of Eleanor Roosevelt?

A Yes.

Q Tell us that.

A It was, actually, a collected edition of assays for the anniversary of her birth in 1984. And it was based on conferences that we were organizing out of an organization that I headed at the time called The Organization of American Historians. And from the conferences we put together what was really, I think, a nice, a commemorative issue of assays about her career.

Q Do you belong to any professional organizations?

A I belong to the one I headed, the Organization of American Historians. I belong to what's called SHFR, it's the

Society for Historians of Foreign Relations, and the American Historical Association.

Q Have you also been associated with something called the Center for the Study of the Presidency?

A Yes. I headed that as president and CEO for two years. Actually the last couple of years I was in New York in that position.

Q When did you go -- when did you arrive at Ohio?

A Last fall, in '97.

Q Then you were involved with the Center of the Study of the Presidency before that?

A Before that. And then before that I was at Indiana.

Q So what years were you at Indiana?

A Roughly from '82 to '8- -- well, I'm confusing the time I headed -- from '82 until '90- -- the end of '96.

Q And what were your -- did you have a title or what was your relationship with the department of history?

A I came there as professor of history to head the Organization of American Historians, and I just kept the title.

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Q Dr. Hoff, tell us what history is.
A Well, in a nutshell history is the study of change over time, and what historians tend to do sometimes appears a mystery to people, but by and large it's fairly simple. We try to gather what we call aggregate data, but that really just means what we do is to try to bring together or assemble a lot of information about a given person or about a given time period.

And we then use that data to come to some generalizations. So what historians do is different, let's say, from what journalists or even lawyers tend to do with information. They tend to itemize it; that is, break it down so they can pull out specific figures and facts that might make a headline or might win a case.

But historians try to deal with the bulk of a vast amount of material, as much material as they can find, and then draw generalizations from that using the entire amount of material.

So we tend to rely then very heavily on research techniques that will allow us to

look at this body of material and draw some sensible common sense generalizations from it.
Q How do you do that, in general? Describe the method by which you do that.
A The methodology, since I've been teaching and researching these last 25 years has changed somewhat. We used to concentrate on what we call now traditional documents. For example, you would go to state-generated documents like presidential papers, or you would go to correspondence or memoirs that prominent people left behind.

But increasingly in the last 25 years, a couple of new subfields have developed in the field of history, and they're usually referred to as the new social history or the new cultural history and this has made for a difference in terms of the way historians operate. We still look for a large body of material, but we look at different sources now.

We look, for example, at court and church records from the past. We look at popular music. We look at in our own time

period newspapers or polling data or ads. We look at material that allows us to do one thing, to try to figure out how average or common people existed in a given time period, because that's what the new social and cultural history is all about. It's about studying history, as we call it, from the bottom up, to look at the individual

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lives of people.
Q Does the study of history require special training and background?
A Yes, it does.
Q And I take it that's what you did in your undergrad and graduate and doctorate level courses?
A Yes.
Q Do you teach students how to discern or study history?
A Yes. It's a basic part of any Ph.D. program.
Q Is there a difference in studying or the method of studying ancient history as opposed to recent history?
A Not really. It's just that we often joke that the ancient historian has the advantage

of fewer documents, whereas if we're studying in the 20th Century, we're overwhelmed with documents.
Q Is there a difference in how you study ordinary people as opposed to more well-known or famous people?
A Not really. Again, the major difference is that you have to look more carefully for your sources when you're studying the average person, because you try to figure out, for example, what they wore, what they thought about, what they might have believed. And that's a little harder than trying to figure out perhaps what a president thought, because his thoughts are going to be part of the official record, for the most part.
Q Doctor, have I asked you to study or discern common knowledge among ordinary people regarding the use of tobacco?
A Yes, you have.
Q And did you use the same methodology to study that issue that you would have used to study any other matter of historical interest in your profession?

A Yes. The study of tobacco comes under the heading of the study of social history.
Q Doctor, let me ask you in simple terms, what is common knowledge as it's used by historians?
A Common knowledge is currently, I think, defined fairly simply as the most common perception or information that a society produces. It's the most -- the lowest common denominator of information or perception that a culture produces. It's the kind of information that we have in our heads and we don't quite know where it came from.
Sometimes I think we grow up believing that it's been imprinted in our genes somehow, but it's those kinds of common

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sense ways of operating that the culture teaches us. And it's a common denominator form of information because it's at the lowest level that the society can offer.

For example, it's transmitted usually generation to generation from parent to child. It's transmitted by neighbors talking to one another, relatives talking

among themselves. We transmit common knowledge when we ride in public transportation like buses or taxis. Wherever we gather in places and socialize and talk, very often this common knowledge about certain subjects is passed on or talked about in those settings.

Q How does it compare or contrast to historical or scientific fact?

A Well, that's a good question. If you look at common knowledge over time, there are a couple of things that come out or stand out about it, and one pertains to your question. Sometimes common knowledge is ahead of scientific information for the time, and sometimes it's behind it. It just -- it depends. It varies given the time period you're studying.

Q What kinds of information or what sources of information create common knowledge as opposed to add to common knowledge as opposed to spreading common knowledge?

A Well, again, the same sources that I mentioned earlier. You're trying to look for what people in a time period would have

had access to, assuming you're dealing with a group, a literate group. You're trying to see what they might have read, what were the popular magazines, what were the popular songs they might have been singing, what were the kinds of plays they might have seen, what were the kinds of common cultural experiences they would have had.

And so in our time period you would look at the popular news magazines or newspapers or in our time period you would also look at television clips.

Q What about in other time periods?

A Then you look back for records that are a little more obscure, like court and religious records. Church records, for example, can tell you an awful lot about when people were married, what time -- when they had children, so that you can figure out, again, how they actually functioned in a society. Sometimes you'll look at the business records for a past time period just to see what wages were like for the average person.

Q Is there any one dominant factor or source

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of information that creates to or adds to or spreads this type of knowledge?

A It's spread largely, as I said, once you have it in your head or in your mind, it spreads usually verbally in past societies from person to person, but in our own society, obviously we have mass means of communication with the radio and television.

Q If you want to determine or study a matter of common knowledge at a particular point in time, do you need to study or discern common knowledge on that subject at a preceding point in time?

A Sometimes it's good to compare, to see if common knowledge has changed.

For example, it was once common to think that the earth was flat, and at a certain point in scientific development, this was no longer part of common knowledge. So sometimes it's good to see if there is a comparison.

And the one thing that does stand out about the use of tobacco is, as you look at past time periods, there is very little to compare. It has simply had a universally

negative image in the minds of most people since it was first introduced in Europe at the end of the 17th -- or the end of the 16th Century.

Q What sources of information did you use to do your study of common knowledge with respect to tobacco?

A Well, I concentrated on the period from the last quarter of the 19th Century in the United States to the middle, really, of the 1960s when the Surgeon General's first major report came out on tobacco. So it's roughly about a century.

Q And what types of sources did you use?

A For the 19th Century, I had to use a particular set of popular magazines for the time period: North American Review, a publication that was very popular among women called the Godey's Lady's Book, Scrivener Atlantic and Scrivener's and Harper's were being published at that time, and North American Review. These were kind of the popular magazines of the day that would have been read from the Civil War to the end of the century.

Q And what about for more recent times?

A Then I used -- it was much easier in recent times because there are computerized indices now to most major newspapers, to most major news magazines. And so I simply started to look at Saturday Evening Post, Scrivener's, Time, Newsweek, Life, and the standard kinds of popular news magazines and in major

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newspapers from 1900 to, say, 1964, '65.
Q And how did these sources compare to the sources you would use to study any other matter and historical fact?
A They really wouldn't differ. It would depend on the subject you were looking for.
Q Did you examine or review medical textbooks?
A I really didn't. I looked at some, what I could only characterize as pseudoscientific tracts, anti-tobacco tracts that were written both in the 19th Century and in the 20th Century, but I hesitate to call them medical textbooks. They simply wouldn't stand up, I don't think, under scientific scrutiny today. But they were the popular kinds of things being written, and by and large, all of these, both in the 19th and in

the 20th centuries, were against tobacco and against its use.
Q Does information in medical or scientific textbooks become part of common knowledge?
A It can if it ends up substantiating or in the case sometimes it replaces common knowledge. You go back to the sample of the earth being flat. Scientific research would then replace that with common knowledge about the fact that it isn't flat. And so sometimes it just substantiates it.
We've thought for a long time that, what, chicken soup would help you if you had a cold. I understand now there is some scientific studies that say, indeed, there is something in chicken soup that is healthful for you when you have a cold. So it depends on what the subject is.
Q How frequently do the sources, do the types of sources you reviewed report on medical or scientific developments?
A The tendency was for the newspapers, in particular, to pick up on, at least in this century, to pick up on the scientific studies as they became more reputable, and

that really begins to, I think, take hold in around the 1940s, sometime in the 1940s.
So as soon as scientific reports that were given widespread credence by the medical profession appeared, they then also began to appear in these popular journals and newspapers; Reader's Digest, for example, was one of the first ones to pick up on some of these studies.
Q Then how does that information become common knowledge?
A Well, Reader's Digest is a good example of how the magazine simply condensed very complicated statistical scientific studies relating cancer, relating lung cancer or health risks to tobacco. And would make it understandable to the average person.

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And very often Reader's Digest did this through an individual, sometimes a well-known athlete or a well-known figure would write one of these articles and try to explain it to the public. Or they would have an individual, say, that he or she had read these studies and, as a result, had decided to stop smoking.

Q What about people who don't read those kinds of magazines; how does that information become part of their common knowledge?

A It's passed on, as I said, verbally at a very, very personal and very early level in most people's lives. I don't think any one of us can remember probably not being told some things to do and some things not to do by our parents. And so common knowledge of any kind is passed on this way.

Q Did you do any kind of systematic review of cigarette advertising or advertisements?

A I looked at a lot of cigarette advertising. I'm not an ad specialist, and I assume you've heard from ad specialists during the course of this trial. But I did want to simply see for myself, since I couldn't clearly remember them, what some of the ads looked like in the '40s, '50s and '60s, so I did go back and look at them.

Q What role does advertising play in either forming or creating or spreading common knowledge?

A It's debatable, I think, exactly the role that advertising plays. It's a component, I

think, of how we think about products. But I don't think anyone relies exclusively on ads for all their information about any given procedure you can.

Q Dr. Hoff, is there anything unique about Indiana as it relates to the development of common knowledge about cigarette smoking and health?

A Well, as it turned out, it does appear to be a somewhat unusual state in terms of the issue of tobacco. And I didn't know this until I had some graduate students actually start to do some research on it, and I started to look into it.

Indiana is one of the first states to mandate textbook use to standardize the use of textbooks for schools, and it began to do that in 1891. And very specifically in the directions coming from the legislature and coming right down to the 1980s from the state legislature, it specifically indicated that in health classes or phys. ed. classes, there had to be taught -- and there was specific textbooks assigned for the teaching of the harm done to young people if they use

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tobacco, and usually alcohol or any caffeine products like coffee and tea.

And these are very prominently featured in the textbooks from about the 1920s down to really sometime in the 1980s.

But as early as 1891 the State began to start to do this. The State also began in 1893 to pass some very stiff anti-smoking laws. And, in fact, for a time, between 1905 and 1909, totally banned the sale or the making of cigarettes in the state.

It found it couldn't enforce that, so by 1909 the legislation was revised to read that minors should not smoke. But it realized -- the State realized it couldn't have the total prohibition on making or selling cigarettes.

And in 1919 it tried to pass a law, for example, to keep politicians who smoked from holding office. So there was a kind of an extreme anti-smoking attitude in the state of Indiana prior to the First World War.

And then after the First World War, the No Tobacco League was headquartered in Indianapolis, and the major publications of

the League came out of Butler, Indiana.

Q What's the No Tobacco League?

A It was an organization that was quite popular, again, just before and immediately after the First World War that was dedicated to banning smoking. It supported amendments to the constitution, for example, to ban smoking in its lifetime; and it in conjunction was known as the anti-cigarette league. There were several of these leagues which were national. They really had their heyday of popularity just before, and then for a short period of time after the First World War.

Q Is there a historical precedent or antecedent, I guess, for the government's involvement in the regulation of cigarettes or cigarette smoke?

A Well, as it turned out, Indiana again is a particularly good example of that, because it had early legislation going back to 1893. But if you look at all the states, by 1909, 12 states had some fairly heavy restrictions on smoking -- primarily cigarettes, had passed legislation restricting smoking of

cigarettes.

So that you can look at individual states and see, for example, that smoking was banned in public transportation in Louisiana, for example, as early as 1890. And there was an attempt around the turn of the century to not only prohibit smoking in public transportation, but in public

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buildings. And so a variety of states took this up at the turn of the century.

It's a more sporadic involvement of government, it would appear, when smoking becomes so popular in the 1920s, '30s and '40s, but you still see individual cases of the State interceding on the grounds for public health reasons to restrict smoking in certain areas.

Q Does the action of the government or the legislature create common knowledge or does it reflect common knowledge?

A I think, by and large, given our democratic system, it reflects common knowledge to the degree it reflects in the time periods I've just mentioned very active organizational activity against smoking. And to that

degree, those people are motivated by common knowledge. They, in turn, organize politically and get the legislatures to take action.

Q Dr. Hoff, you mentioned school curriculum and textbooks. How does the state involvement in curriculums or textbook lists create or contribute to common knowledge?

A Well, again, in the state of Indiana, what already would have been because of the reform activity going on, you would have had common knowledge as you would have had in other states, simply reinforced very strongly in these textbooks. It's hard to convey exactly how strong the language was in these early textbooks about not smoking, not using alcohol, not drinking tea or coffee. And they were all, more or less, lumped together. But there were very specific chapters indicating to teachers how they should instruct children about what was really being referred to as the evils of these types of drugs.

Q Let me show you, Doctor, an exhibit that has been admitted into evidence, Defendants'

B648. Can you see that from there?

A More or less, yeah.

Q This is a paper entitled "Counterblaste to Tobacco," and it's sourced King James, I, 1604. Are you familiar with this publication?

A I am now. It wasn't one that I initially was familiar with, but because he's so often mentioned in these anti-tobacco tracts, I very quickly became familiar with it.

Q And who was King James?

A He succeeded Elizabeth the first to the throne in about 1603 and reigned, I think, until sometime about in 1630s and happened to be the first King of England who was there when tobacco started to be imported into England. And what he did was to really

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represent the point of view of so many kings and queens of England following him, and so many other heads of other nations. They all came out against tobacco when it was first imported into their countries.

And then, within a century, that is, let's say, this is in 1603, 1604, by the end of that century all of them were still

condemning it, but they were taxing it, so that they brought in money to the state coffers from tobacco.

Q Now, does something like this find its way into common in this century?

A Well, you still see this quoted. You still see James, I, quoted in practically anything that's written from an anti-tobacco standpoint. It's just one of the most famous, one of the earliest quotes.

Q What's the historical significance of the fact that something like this gets repeated over time?

A That's a way, again, even before you have mass means of communication, people verbally pass this on to one another. And his quote is one of the ones that simply was a part of our folklore, and it comes from James down through the Puritans who come from England to the Colonies, and you have this being then used in sermons by Puritan ministers.

Q Let me show you what we've marked and admitted as A438. This is an article from a 1941 edition of the Reader's Digest that talks about nicotine and cigarette smoke.

How does a -- compare the Reader's Digest to something today that people use to communicate or express common knowledge.

A Well, I hate to compare it but Reader's Digest, as I indicated to you, condensed a lot of things to make their stories and their articles as simple as possible. And you'd almost have to compare it today, though the subject matter would be different, to something like People's magazine, I think. It really was what most people read. And it was in doctors' offices, dentists' offices, it was in barber shops. You couldn't get away from Reader's Digest.

It kind of was the low end of the popular magazine scale with National Geographic being at the high end. So that it was just -- it was much more popular than it is today, and it's hard for us sometimes to think about why it was so popular. But it was because of the simplicity and the shortness of these articles.

Q In the 19'40s, did magazines like Reader's Digest play a bigger role in spreading or

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disseminating common knowledge than they do today?

A I think it does because it has an unusual history and this is where these techniques that we use as historians comes to play.

I went back and looked at the founders of Reader's Digest, and the two people who were in charge of it were a husband and wife team named Wallace, DeWitt Wallace and his wife, Lila. And they began in 1924 with their second year of publication to print anti-smoking articles before there was really the bonafide scientific information available to them. They simply both were against smoking. So Reader's Digest has that reputation simply because the founders were insisting that this type of material appear in it.

So they picked up on some of the popular religious and other kinds of anti-tobacco tracts that were available already in the '20s and '30s and begin to then condense them for a popular audience.

They really condensed even the early bonafide scientific studies coming out of

the '40s before Life Magazine or Saturday Evening Post did. So they were ahead of the game, largely because of the intent of the owners.

Q And did Reader's Digest remain a popular source of information into the '50s and the '60s?

A Yes. Yes.

Q How would you compare or contrast the Reader's Digest to something like Cable Television or the Internet or --

A Well, I think, again, it served that same purpose. In other words, because it was relatively cheap, relatively easy, relatively accessible to everyone, so it served the same purpose. It's hard to compare the two. It's like apples and oranges; but, in essence, the function I think is the same.

Q Let me show you what we've marked and admitted as Exhibit 007. This is an article from the Indianapolis Star dated January 19, 1964. It's a column by somebody known -- described as Dr. Joyce Brothers?

A Yes.

Q Tell us whether newspaper columns during this time period played any role in either creating or spreading common knowledge.

A Well, I think they did then and they do now. I mean, Joyce Brothers is still with us and Dear Abby.

It's interesting that there was also a local columnist in the Indianapolis Star in

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this time period, a guy name George Crane who would, because he was local, I think was paid a bit more attention to.

But all of the major newspapers would have been carrying either local or syndicated columns, advice columns in this time period, just as we read them today. And especially in 1964, with the Surgeon General's Report, which received such widespread publicity, these columnists then received questions and gave answers out about tobacco and its health-related problems.

Q Now, there's a quote here attributed to Mark Twain. Who was Mark Twain?

A He was -- we think of him mainly in terms of Tom Sawyer or Huckleberry Finn, but he

primarily made a living in the late 19th Century as a popular lecturer following the Civil War and so he was very well known for these quips that he would come up with. In this case, it's easy to give up tobacco because he had done it so many times.

What I didn't say about common knowledge earlier comes in here, and probably it's just as well I mention it now; is that, if we didn't have this common knowledge from our culture, this lowest level of information, we couldn't laugh at things like this because we wouldn't know that it was funny. In other words, humor and jokes and puns and satire all come out of a common culture.

So you have to know that -- you already know that it's hard to give up tobacco to laugh at this. Or that have you to think it's hard to give up tobacco or you can't laugh at it. So our jokes and our humor is based on this kind of common knowledge. Otherwise, we would star at that and think, well, what's funny? Nothing inherently funny about the words.

Q Do other aspects of popular culture reflect common knowledge? I guess what we refer to as popular culture, things like music and humor and --

A Yeah. Popular songs, do both in the late 19th Century and this century, because we recognize phrases or words. A fairly well-known pop singer today, K.D. Lang, has just brought out a new disk in which all the songs are about smoking. They either have smoke in the title or she's singing about cigarettes in one capacity or another.

Q And what does the fact that -- when was Mark Twain alive?

A He lived -- he was from 1835 to 1910, and he was at the height of his popularity really in the 1880s and 1890s as a lecturer in this

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country. And I'm assuming that's from a lecture.

Q What is the fact that something that was said 65, 70 years earlier tell you about common knowledge on that subject?

A Well, it shows its continuity on this subject. As I said before, this is one of the few subjects, that is, the harms that

could accrue to someone from smoking, that is just uniform no matter whether we go back to King James or whether we go on to our present time period. That it's just a uniform view about its habit-forming characteristics or its health risks.

Q Let me show you what we've marked and admitted as Defendants' A5. This is a portion of the front page of the Indianapolis Star on Sunday, January 12, 1964.

Does the concept -- without stating the obvious, there are certain matters that are front page news on this day. One of them apparently has something to do with Panama.

A Yes.

Q What does the concept or the idea of front page news tell you about the creation or this spread of common knowledge?

A Well, I think it's sort of self-evident. When we look at a newspaper, I think most of us tend to look at the headlines first. And so if it's on the front page, even if you don't read anything else, you're going to get the headline.

So the fact that this Surgeon General's Report made the headlines not only in the Star but of every newspaper in the country of 1964, meant that people woke up that morning and the first thing they saw as they looked at their newspapers was this headline about the -- Terry Luther's statement here on smoking.

The Star is typical of the way in which this issue was covered. If you look at, oh, we did a very quick computer study of headlines coming out of the Star from about '58 through '65, and about 300 articles appeared on smoking in that time period. And over half of them occurred as a result of this one report. In other words, it went on and on and on the rest of 1964.

Q What, if anything, is the relationship between headlines as opposed to the text of an article in the formation or the spread of common knowledge?

A Well, although I've majored in history I was once a journalism major and I think this still rings true. You write newspaper stories even today, I think, in the way that

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we were taught to write them about 20 years ago. The headline conveys the important point of the story.

The first couple of paragraphs will deal with that. And as you read further and further down, you may get people interviewed or statements made which question or even sometimes oppose the major thrust of the story.

So stories are constructed. And if you read them to the end, you will find people questioning, perhaps, what the headline is conveying, but you have to read it to the end to find that.

Yesterday, for example, I was reading the story that made the front page of the Times on single sex school for girls, and the headline said they don't do any good, something to that effect. If you read the complete story, the last three or four paragraphs where people saying we don't think this report is very good, but you had to read column after column of this one story to get there.

Q What's more likely to add to or contribute

to common knowledge, a headline or the text of a story?

A The headline, I think, because -- we don't know. I mean, you can't really gauge scientifically in any way how much of a story people read. Today's -- some of today's newspapers just have the story on one page, so that usually you can assume they would read the whole thing. But traditional newspapers like the Star or New York Times have lengthy articles. But I think we know they look at the headlines, and maybe the first couple of paragraphs.

Q Doctor, let me show you, this is Defendants' A264.

MR. WESTBROOK: Your Honor, I believe we object to this one. I think it's the doctor's testimony that she didn't consult the medical or scientific literature.

THE COURT: Is that one of those that was admitted?

MR. OHLEMEYER: Yes. I'm going to ask her for an opinion on that.

MR. WESTBROOK: Maybe we should

approach, Your Honor.

(Bench discussion.)

Q Dr. Hoff, let me ask you to assume that this is the text of a letter sent to the Federal Trade Commission by the executive vice president of the AMA commenting on proposed regulations for cigarette advertising labeling.

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A Can you read it to me?
Q "The health hazards of excessive smoking have been well publicized for more than 10 years and are common knowledge. Labeling will not alert even the young cigarette smoker to any risk to which he's not already aware of."
Based on your background, your experience and your research and review of this subject, in your opinion, Doctor, were the health hazards of excessive smoking well publicized and common knowledge 10 years prior to 1964?
MR. MOTLEY: May I have that question back again, Your Honor?
THE COURT: Would you read the question back, please.

(The requested material was read by the reporter.)
MR. MOTLEY: Health smoking to who? To smokers? I have no objection. That's what this is about.
MR. OHLEMEYER: That was my question, Your Honor.
MR. MOTLEY: I didn't hear that. Mrs. Wiley didn't smoke.
MR. OHLEMEYER: Well, Your Honor, Mr. Motley is going to get a chance to argue his case and it's not quarter to three --
THE COURT: Do you have an objection?
MR. MOTLEY: I object to -- if he puts in there smokers, I have no objection.
MR. OHLEMEYER: Let me rephrase the question.
Q Doctor, based on your background, your education, your experience, your research and review on the subject of common knowledge as it relates to tobacco, do you have an opinion as to whether the health hazards of excessive smoking have been well publicized for 10 years prior to 1964 and

were matters of common knowledge?
A Yes.
Q And what is your opinion?
A My opinion is that yes, they were.
MR. OHLEMEYER: Thank you, Doctor.
THE COURT: Thank you, Counselor.
Mr. Westbrook.
MR. WESTBROOK: Thank you, Your Honor.

CROSS-EXAMINATION
BY MR. WESTBROOK:
Q Good after, Professor Hoff. How are you?
A Hello.
Q I'm going to put this down so you can see my board.
We have not met before, have we?
A No, we have not.

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Q Can you see that okay, Professor?
A Yes, now I can.
Q My writing is not the best. I've written common knowledge and industry knowledge. Common knowledge is different from an industry's knowledge, is it not?
A I would think so, yeah.
Q I think common knowledge, as you've

described it before, is knowledge that we grow up with, I think you said it's sort of embedded in your genes as you grow up.
A Uh-hum.
Q And that can certainly differ from industry knowledge, which is what, in this particular case, for instance, the tobacco industry knew about its product internally; correct?
A Uh-hum.
Q And I think you've stated on another occasion that, in the course of your research and looking through the literature, that you've come to know that the tobacco industry knew much more about the hazards of tobacco than it revealed in public; correct?
A I don't know if I ever gave a deposition to that effect. Everyone begins to know more about tobacco beginning with these studies of the late -- well, in the '40s and '50s, yeah.
MR. WESTBROOK: May I approach the witness, Your Honor?
THE COURT: Yes.
Q Doctor, let me see if I could refresh your recollection.

A Sure.
Q Yes. Do you recall in December that you had your deposition taken?
A Yes, I sure do.
Q And do you recall giving the answer that you had reviewed?
A Yes.
Q "And I think what one takes away from the headlines, I think it's obvious, and that is that tobacco executives knew more about the negative health implications of tobacco than they conveyed publicly."
A And that would be beginning in, I would say, again with these studies coming out in the '40s and '50s.
MR. OHLEMEYER: Page and line numbers, please?
MR. WESTBROOK: Page 50, line 16.
Q I'm going to truncate it to knew more than they acknowledged.
A That's okay, as long as you make it time bound.
Q Sure. And that would be beginning in the '40s and '50s?
A Yes, when I think people do commonly agree

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that these were no longer pseudoscientific studies.

Q Now, Professor, you were asked about this Journal of the American Medical Association statement.

A And that's for, what, '64?

Q That was in 1964, yes.

MR. WESTBROOK: Your Honor, may I approach the witness?

THE COURT: Go ahead.

Q I would like to show you articles from the -- I only have one copy so I'll stand here with you, if I could -- the Journal of the American Medical Association for July 19, 1995. I wanted to ask you about this statement here. "In summary, the evidence is unequivocal --"

MR. OHLEMEYER: Excuse me, Your Honor. May we approach for a moment?

THE COURT: Yes.

(Bench discussion)

THE COURT: Go ahead, Mr. Westbrook.

MR. WESTBROOK: Thank you, Your Honor.

Q Professor, I wanted to ask you about this statement from the Journal of the American Medical Association. That is the same journal we see over here; correct?

A Yes.

Q "In summary, the evidence is unequivocal the U.S. public has been duped by the tobacco industry. No right thinking individual can ignore the evidence. We should all be outraged and we should force the removal of this scourge from our nation and by so doing set an example for the world. We recognize the serious consequences of this ambition, but the health of our nation is more important than the profits of any single industry."

Professor, in 1995, did the board -- you see all the doctors listed there of JAMA -- come to the same type of conclusion in stronger language that you did that the industry knew more than they acknowledged?

MR. OHLEMEYER: That's an argument, Your Honor. I object to it.

THE COURT: Rephrase that question.

Q Professor, considering the quote that we

just read, and in particular the statement that the U.S. public has been duped by the tobacco industry, is the JAMA article expressing the same sentiment that you told me that you also learned that the industry knew more than it acknowledged about the hazards of tobacco?

A I'm not sure I still understand the

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question. Is -- this statement clearly is different from the one in 1963 or '4.

Q Yes. I'm asking --

THE COURT: Can you keep your voice up, please.

THE WITNESS: All right.

THE COURT: Thank you.

Q Let me ask one more time, Professor. With reference to the statement by JAMA that the U.S. public has been duped by the tobacco industry, I'm asking you is that essentially what you were saying when you said that the industry knew more than it acknowledged beginning in the '40s and '50s?

A No. Because, for one thing, we would never use a quote from 1995 and a quote from 1963 or '4 and say that they reflect the same

thing. It's an inaccuranism to project backwards in that fashion. When -- as I recall now in the deposition, I was really being specifically asked about these latest revelations in terms of recent releases of tobacco documents.

Q Correct.

A And that's where I said that I, obviously, it appeared then that they did know more. But the two statements aren't comparable.

Q Were you aware, Professor, that the AMA journal editors were also reviewing the documents that have been released over time?

A Exactly. But were you aware that in 1963 the AMA was not on board with the 1964 Surgeon General's Report? In other words, they were still saying that the conclusions were still ambiguous as of 1963. So the JAMA is like any other organization or journal, reflects again, I think, the common knowledge of the time to a certain degree, even a scientific journal.

Q All right, Professor, now, with respect to the industry knowledge, industry knowledge can include things that do not get out into

public to become common knowledge; is that correct?

A Uh-hum.

Q So we might have, for instance, internal research reports. We might have reports of meetings among the industry.

A Uh-hum.

Q And other types of things like that which, if they don't get out into the public and they don't become assimilated into these embedded genes, don't become part of the common knowledge; correct?

A Right.

Q Okay. And I think it's your view, is it not, that information that comes out takes time to sink in and become part of the common knowledge.

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A Uh-hum.
Q Just a headline or two or several headlines, they don't alter common knowledge right away; correct?
A Well, if it's reinforcing common knowledge, it does have that -- it has a reinforcement factor. So, in the case of tobacco, most of what you would read in headlines or in jokes

or cartoons would reinforce the negative image of tobacco.
Q But if something came out that was different or something new about tobacco, that would not necessarily automatically be common knowledge, would it?
A Not necessarily. The time frames become shorter because of our sophisticated means of communication. I think information about secondary smoke has spread much more rapidly in the 1980s than other information about tobacco spread earlier.
Q Professor, we talked about your deposition in this case in December. At your deposition, Professor, you told us at the time that you had no opinion on common knowledge concerning environmental tobacco smoke on the '60s, '70s and '80s; do you recall that?
A Yes.
Q And do you recall telling us that only just now -- and you were speaking about December 1997 -- only just now is the public beginning to absorb from the headlines information on secondhand smoke. Correct?

A Uh-hum. That's true.
Q Now, things that influence common knowledge, I think you said on direct examination, include advertisements from an industry.
A Can, yes.
Q People may not accept them as gospel, but it's one thing that people consider with respect to common knowledge; correct?
A Uh-hum. Uh-hum.
Q I think you've stated before, Professor, that during -- especially during the world wars, cigarette smoking was a common practice among the military and cigarettes were given out, things like that; correct?
A Uh-hum. Yes.
Q And in the course of your work you've also seen, have you not, advertisements showing military men and women in connection with the promotion of cigarettes. Correct?
A Uh-hum.
Q Let me show you a set of the advertisements and ask you, are these advertisements the type of things that when you are doing your research, you like to review them and see how they assimilate into the development of

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common knowledge?
A Yes, we tend to look at these very carefully.
MR. WESTBROOK: Your Honor, we would offer this package of advertisements as 70026.
THE COURT: Why don't we put a different number on that.
MR. CASSELL: 111.
MR. MOTLEY: Those are already in, Your Honor, as 71. I may be mistaken, but I think I'm correct.
MR. WESTBROOK: Are they the same set?
MR. OHLEMEYER: These are in evidence, Your Honor.
MR. MOTLEY: These are in evidence.
MR. WESTBROOK: Let's make sure it's the same packet.
MR. MOTLEY: Yes.
MR. WESTBROOK: Your Honor, may we pass the stuff to the jury?
THE COURT: Yes. Make sure they're the same ones.
Okay. Thank you.

Q Now, Professor, looking at the package of advertisements, do they generally reflect that the industry was promoting cigarettes as a normal part of military life and a desirable part of military life?
A I'd kind of reword that to a degree. What they reflect is that the government was promoting cigarette smoking and that the industry was taking advantage of the fact that cigarettes were being given away with the rations to these soldiers. Same thing happened in the First World War.
Q Right. And the industry was advertising their cigarettes and showing military men.
A Because they knew the government was giving them away. And I would venture to suggest that, if the government had been giving away a particular candy bar, the candy bar manufacturer would have put out ads like this.
Q They did give away Hershey bars, didn't they?
A Uh-hum, and they were advertised that way for a while.
Q Yes. And as a result --

A I didn't want to give a plug to Hershey.
Q We had Hershey's Kisses in here yesterday, so...
As a result of the people in the military taking up the smoking habit, you're aware that veterans smoked to a much larger percentage than normal people in the population.

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MR. OHLEMEYER: Objection, Your Honor, that's argument.
MR. WESTBROOK: I think she agreed.
THE COURT: Overruled.
Q Professor?
A Again, we know that smoking was on the increase after the First World War, and again after the Second World War. But, again, the historical studies go back to government promotion of cigarettes during both wars and the Red Cross handed them out.
Q Let's take a look at the ads. Look at the second ad in the package for Camels. Do you see the -- seems to be a quote from a serviceman, it's hard to see, but the quote is legible. "Camels, our cigarette. Suits the throat and the taste to a T." Do you

see that, Professor?
A Yes, I see it.
Q As someone who has reviewed advertisements over time, you can interpret that to mean an assertion that Camels aren't going to bother your throat; correct?
A Yes. And at the same time they would have been reading Reader's Digest which had veterans writing about how they wanted people to give up smoking.
MR. MOTLEY: Your Honor, I object to the witness interjecting, after she's answered the question making an editorial comment. I move to --
THE COURT: The last comment about the Reader's Digest will go out. Jury will disregard that.
Just answer the questions now.
THE WITNESS: All right.
Q Professor, if we can, let's turn back six pages.
A Is that can you tell the real difference. This one, okay. Fine.
Q For Pall Mall. "Pall Mall modern design filters the smoke, lessens throat

irritation." Again, that would be a representation, as you would interpret it, of good health, would it not?
A No. It would be an indication to me that cigarettes cause throat irritation and this lessened that. I don't think it has anything to do with good health.
Q That Pall Malls lessened throat irritation.
A Uh-hum. Implying that cigarettes cause throat irritation.
Q (Inaudible)
Doctor, if we can, now turn to the next to last page.
A Okay.
Q "The thought behind the gift"?
A Yes.
Q Do you see this ad now again, this one

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happens to be for Camels, stating "What gifts do they go for? Cigarettes. What brand do they like best? Camel." And the text is, "When you're thinking of gifts for friends or relatives in service, you can bank on this. It's cigarettes they appreciate and, Camel, the smoke they like best."

Now, that advertisement is discussing civilians sending to cigarettes to send Camels to people; correct?

A Yes.

Q Now, Doctor, you're aware from your reading and research as well over time that another group that appeared in cigarette ads over time were doctors and nurses; correct? You've seen some of those ads?

A Yes, I've seen some of those.

MR. WESTBROOK: Your Honor, may I approach the witness?

THE COURT: Go ahead.

Q Maybe what I can do is give you one of each and we'll move this along.

A These are also in the packet then; right?

Q I think these are a different group.

A All right. Thank you.

MR. WESTBROOK: Your Honor, these are all in evidence except the last document and I would move that into evidence.

THE COURT: The last one being?

MR. WESTBROOK: That Viceroys are smoother.

THE COURT: Mr. Ohlemeyer, 111 is

the only document not in evidence, the Viceroy. Any objection?

MR. OHLEMEYER: No.

THE COURT: All right. 111 will be admitted.

(Plaintiffs' Exhibit(s) 111 received in evidence.)

MR. WESTBROOK: Your Honor, may I hand copies of these to the bailiff to pass to the jury?

THE COURT: All right.

Q Doctor, have you had a chance to take a look at the ads?

A Yes, I sure have.

Q Does each one show or reflect members of the medical profession, either doctors or nurses smoking?

A Yes.

Q And from your experience and review of this type of literature, do you agree that companies, at least in the past, tried to show the medical profession doing something to imply that it was an acceptable or healthy thing to do?

MR. OHLEMEYER: Objection, Your

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Honor, it's argumentative.
MR. WESTBROOK: I'm on cross-examination, Your Honor.
THE COURT: Overruled. You may answer.

A I think since these are from, what, 1944 or '45, you had most doctors giving advice to patients about light and heavy smoking and many doctors smoking themselves, so that to that degree the ads do reflect doctors smoking.

Q And on the last one, which was the Viceroys are smoother?

A They're smoother, yes.

Q Do you see the headline or at least the top is "Informed nurses are discovering why Viceroys are smoother"?

A Uh-hum.

Q And within the text there on the right-hand side it talks about "Viceroy having 20,000 tiny filters, that is why Viceroys are smoother by far, never never rough, and that is why so many nurses now smoke and recommend Viceroys"; right?

A Yes.

Q Doctor, is it, from your review of the common knowledge, is it common knowledge which different carcinogens are in cigarette smoke?

A Not at all. Common knowledge, as I've said several times, is simply very, very general, basic ideas about things to do or not to do.

Q The embedded in the genes type of information.

A Yes.

Q I wrote down a phrase that you said on direct, when I think you were looking at the King James Counterblaste 1600, and you remarked about the universal negative image of smoking; correct?

A Yes.

Q Is it correct that in this century, in this country, beginning in about the 1920s, smoking began to be glamorized in the movies, for instance?

A Yes.

Q The image of smoking far from being universally condemned, it became something sophisticated to do; correct?

A Yes.

Q And, in fact, the image of women smoking really got its start in the movies? It went from sort of a no-no for woman to acceptable as women started to smoke in the movies?

A It started in the '20s from movies, but from other cultural aspects of the '20s.

Q And by into the 1950s or so, there was even protocol that developed based on smoking

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such as whether the man should light his cigarette first or light both the cigarettes; correct?

A Very true.

Q So smoking really became an accepted part of society, and there were protocols about how people would light cigarettes.

A Yes.

Q One thing, Doctor, that you review when you do your type of survey, you said were ads, and also you'd review articles and press releases, correct, to try to get the whole compendium of what is being said?

A Uh-hum.

Q And you're familiar with that the tobacco industry has been quite vocal about its views on tobacco over the years.

A Yes.

Q And the tobacco industry ads and statements, they as well have to go into the calculation of common knowledge, don't they?

A They are a component. Advertising is a part of common knowledge.

Q Sure. Professor, do you know how early it was that the industry created a coordinated effort to try to reassure people that smoking wasn't a health problem?

A I'm not sure I have a specific date, but I would assume that it would come sometime on the heels of some of these early studies from the '40s and possibly and probably early '50s.

Q You were right on the money, Professor.

MR. WESTBROOK: Your Honor, may I show the Professor 3793 which is in evidence?

THE COURT: Go ahead.

Q Professor, this is a document from the early '50s, and I'm going to ask you just about a short piece of it.

On page 3 of the document -- and just as background I'll represent to you that

this reports on a meeting of some members of the tobacco industry.

On page 3 --

A "There is only one problem."

Q "There is only one problem, confidence in how to establish a public assurance and how to create it."

A This is, what, from 1950?

Q This is from, I believe, 1953, Professor.

Now, is advertising and public statements, releases by an industry, is that a way an industry goes about trying to get its view across to the public?

A Yes. All industries do.

Q Professor, in the course of your work and review, have you seen this particular forwarding memorandum before I handed it to

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you?
A From 1952?
Q Yes. I think it's '52 or '53.
A No, I have not.
Q Professor, let me show you another document that's in evidence.
MR. WESTBROOK: It's Exhibit -- I've got two numbers on it, Your Honor. Let

me see which number it is.
Your Honor, the controlling number is 1409 in this case, Exhibit 1409.
THE COURT: That's in evidence. Thank you.
MR. WESTBROOK: Your Honor, may we pass copies of this document to the jury?
THE COURT: All right.
Q Professor, if I may just show you what I'm going to ask you about. This is talking about the strategy on the first page to start off with.
A Uh-hum.
Q Would you just take a look and read that and then I'll ask you.
A Okay. All right.
Q Now, Professor, the document, and this is 1972, refers to an industry strategy and brilliantly conceived and executed for years helping us to win important battles, and then goes on and describes the strategy. And the first thing it says is, "Creating doubt about the health charge without actually denying it."
In your review of the literature over

the years, and especially the newspapers and magazines, et cetera, did you see references from time to time where the tobacco industry would come in and they would say this has not been proven, that has not been proven, that would be a statement by government and then the industry would dispute it?
A Primarily in the very early '50s as some of these early studies were coming out, I recall, particularly in '54 there were arguments that they perhaps weren't conclusive in the Frank Statement, for example.
And in '54 that was generally correct. A number of other sources agreed with that.
Q When did it -- and by 1972, this document says the industry was creating doubt about the health charge without actually denying it. Have you made a study of when the scientific and medical authorities had concluded that smoking causes cancer?
A No. I've read summaries of when they have, and really prior to the Surgeon General's Report in '64, there wasn't much concurrence on it, and even after that. Questions

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continued to be raised.

The fact that they talk about a health charge, I think, could refer as much to common knowledge about health risks as the scientific reports themselves.

Q Professor, I'd like you to assume for the purposes of this question that in 1998, this week, officials, vice presidents and others from the tobacco industry have come in here and said that there is no scientific proof that smoking causes cancer. In your view, Professor, would that be contrary to common knowledge?

MR. OHLEMEYER: Your Honor, it's argumentative. It's a misstatement of their testimony.

MR. WESTBROOK: I asked her to assume. If it's not the testimony --

THE COURT: I'm going to sustain that objection.

Q Professor, if the tobacco industry were to state publicly today that there is no scientific proof that smoking causes cancer, would that be contrary to common knowledge?

A Again, because common knowledge is general,

there is very strong common knowledge about the health risks of tobacco and have been over time.

You get a breakdown on polls if you ask people specifically whether cigarettes cause lung cancer or other forms of diseases. So it's a hard question to answer.

Categorically, I think over by this time period there would be a higher percentage of Americans who would say that they think there is a connection between smoking and lung cancer. Whether or not there is scientific proof, I don't think common knowledge can -- is of the type of information that could answer that kind of a question.

Q Is it common knowledge today that smoking causes lung cancer?

A I don't know if it's common knowledge that it causes lung cancer. I think the common knowledge that we're talking about is this very basic common sense point of view. And polls still show that when people are asked very specific questions like does this cause that, they're less likely to say yes than if

they're asked more general questions.

And the common knowledge I'm talking about is that cigarette smoking and other forms of tobacco use is unhealthy. That, I think, is standard common knowledge today just as it was 200 years ago.

Whether or not you get a perfect 100 percent on whether it causes lung

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cancer, I can't say because common knowledge isn't geared to answer these kinds of very specific causal questions.

Q Is common knowledge something that each person should know?

A I think, again, in the very general sense in terms of how we're brought up in a particular culture, you do know certain things are either restricted or should be restricted or certain things are all right to do. And in that sense, it's a general way for you to conduct yourself.

Q So common knowledge, then, is something that everyone should know?

A I think any kind of basic level of the society, yes.

Q Let me ask you to take a look at an excerpt

from Newsweek in 1966.

MR. WESTBROOK: This is Defendants' Exhibit 355, Your Honor.

Your Honor, we would move 355 into evidence, if it wasn't in Counsel's packet.

MR. OHLEMEYER: For what purpose, Your Honor? Consumer expectations?

MR. WESTBROOK: For the same purpose that his documents were offered, Your Honor. It's another one of the articles which bears on statements being made about tobacco, and particularly it pertains to the Tobacco Institute's position in '66.

MR. OHLEMEYER: No objection.

THE COURT: 355 will be admitted.

(Plaintiffs' Exhibit(s) 355 received in evidence.)

Q Professor, I have one here that has this piece highlighted. Down here, "The Tobacco Institute staunchly." Take a look at that.

Professor, the document states, "Although the FTC studies could start another tar derby among cigarette makers, spokesmen for the Tobacco Institute

staunchly hold that there is no valid scientific evidence that either tar or nicotine is responsible for any human illness."

Now, Professor, would statements like that in the press tend to have some impact on common knowledge that people would read them and at least think about them as they read the article?

A Well, a part of the way in which our common knowledge continues and grows is that it is the product of a number of different kinds of inputs, and this would be processed to a degree as part of that.

I don't know if this was the beginning of the article, but the headline might, of course, convey a different impression

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entirely. This is rather far down in the article. The article seems to begin by talking about cigarette smoking is bad for your health.

So, as I said earlier, with respect to newspaper articles, you have to read that far down to find that statement.

Q And is it your general view that with

respect to newspapers, Professor, articles that aren't on the front page are less likely to be read than those that are on the front page?

A I think so.

Q Let me show you an article out of Forbes 1982.

MR. WESTBROOK: It's Exhibit 26324, Your Honor.

Your Honor, we would move Exhibit 26324 into evidence under the same reasoning as we moved the Newsweek article.

THE COURT: Any objection?

MR. OHLEMEYER: Not for that purpose, Your Honor.

THE COURT: 26324 will be admitted.

(Plaintiffs' Exhibit(s) 26324 received in evidence.)

MR. WESTBROOK: Could we pass copies to the jury, Your Honor?

THE COURT: Do we need to do that, Counselor?

MR. WESTBROOK: We can move it along.

BY MR. WESTBROOK:

Q Professor, if I can move this along, I want to -- 1982, I want to refer you to the statement by the Tobacco Institute's Horace Kornegay in 1982, "A lot of people are not convinced that smoking causes cancer."

Do you see that?

A Yes.

Q Now, is that another one of those statements by the industry that would go into this equation of the development and movement of common knowledge?

A Yes. If it were in a popularly read magazine, which I wouldn't say Forbes was.

MR. WESTBROOK: Your Honor, I think I'm about to switch to a little different area.

THE COURT: How much more cross-examination do you have, Counselor?

MR. WESTBROOK: Let me review my box for a minute, Your Honor.

THE COURT: All right.

MR. MOTLEY: Judge, if we take a break, I guarantee you, we'll shorten it.

THE COURT: We'll take the afternoon break. We'll break for about 15

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minutes, ladies and gentlemen.
(Standard admonition)
THE COURT: You may step down, Doctor.
You may go with the bailiff.
MR. CASSELL: All rise.
(A brief recess was taken.)
MR. CASSELL: All rise.
THE COURT: Be seated. Jury back in its entirety.
We were on continuation of cross-examination.
Just have a seat, Doctor. Would you again state your name for the record.
THE WITNESS: Joan Hoff.
THE COURT: Thank you.
Mr. Westbrook.
MR. WESTBROOK: Thank you, Your Honor.

BY MR. WESTBROOK:

Q Professor, on the break I have reduced the box to this.
MR. MOTLEY: And nobody objected, I might add.
Q Professor, I think you've mentioned in the

past that the New York Times is a well-read newspaper; correct?
A Yes.
Q In fact, the Times spreads around the country, doesn't it, eventually?
A More or less it does, yes.
Q Did you mention you were --
A Less now than it used to, I think.
Q Did you mention you were reading something in the Times yesterday?
A Yes, I was.
Q Let me show you a document, Exhibit 7016.
Professor, if you could, if you would just look at the second page. And do you see reference to an advertisement being published in the Times and elsewhere?
A Yes.
Q And you recognize the names; the New York Daily News, the New York Times and the Washington Post?
A Yes.
Q And then if you would turn --
MR. WESTBROOK: May I approach the witness, Your Honor?
THE COURT: Yes.

Q Do you see the title of the advertisements, "The Question About Smoking and Health is Still Open," and then if you could turn toward the back. The national advertisements.
Do you see the --
A Uh-hum --
Q That is the article.

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MR. WESTBROOK: Your Honor, we would move Exhibit 7016 into evidence.
THE COURT: For that limited purpose, Counselor?
MR. WESTBROOK: Yes, Your Honor.
THE COURT: Any objection?
MR. OHLEMEYER: Not for that purpose, Your Honor.
THE COURT: 7016 will be admitted.
(Plaintiffs' Exhibit(s) 7016 received in evidence.)

Q Professor, if you could turn back, can you confirm that this document indicates that on December 1 the Tobacco Institute inserted the advertisement that's back further into the document in the New York Daily News, the New York Times and the Washington Post?

A Yes.
Q And the headline was, "The Question About Smoking and Health is Still a Question."
A Yes.
Q Correct?
A I see it.
Q All right. And does this appear to be, or can you tell, is this a full-page type of advertisement?
A It's hard to tell from the shape. It might have been reduced.
THE COURT: I can't hear you, Doctor.
A It's hard to tell from this Xerox copy whether it was reduced from it's original. It looks like a half page to me.
Q The headline that would catch somebody's attention was "The Question About Smoking and Health is Still a Question"?
A Yes.
Q And that was 1970, Doctor?
A Yes, carried as what, an ad? Not a news story.
Q Yes, carried as an ad in the Times and those other papers.

Okay. Now, in more modern times the television networks have come into much more prominence, at least in the '60s and '70s, '80s, they may be fading some now, and competed with newspapers to get the word out to people which would influence common knowledge, wouldn't they?
A Yes.
Q Let me show you a transcript from a program called 20/20.
MR. WESTBROOK: It's Exhibit 22562, Your Honor.
Q Professor, are you familiar with the show 20/20?
A Yes, I am.
Q Is that a show which gets national coverage?
A ABC would like to think so.

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Q They certainly put it on their national network, don't they?
A Yes.
Q You recognize the name of the first person speaking, Hugh Downs?
A Yes, I sure do.
Q And John Stossel, he's on a lot?
A Yes.

MR. WESTBROOK: Your Honor, we would move 22562 into evidence for the same purpose.
MR. OHLEMEYER: I have an objection to it, Your Honor, on 403 grounds as well.
(Bench discussion)
THE COURT: Admitted on a modified basis, 22562.
Go ahead, Counselor.
(Plaintiffs' Exhibit(s) 22562 received in evidence.)
Q Professor, let me read you the statement. First of all, let me identify, this ad October 20, 1983. And on page 2 -- of course, 20/20 is questions by Hugh Downs and answers and they bring people to talk about topics.
A Uh-hum.
Q On page 2, do you see where it says that they contacted, John Stossel contacted tobacco companies. They told him to talk to the Tobacco Institute. And the Tobacco Institute said Ann Browder would speak for them. So Ann Browder is speaking for the Tobacco Institute?

A On the program.
Q On the program. And then the quote from Ann Browder on the issue is, "The case is still open. The jury has not come in."
Correct?
A Yes.
MR. OHLEMEYER: Do you mind reading the next sentence.
THE COURT: Go ahead.
Q "Stossel: It may not be harmful, you're not convinced.
"Browder: It may be or it may not be. We don't know."
Professor, it's important, is it not, for common knowledge to develop correctly that things that are said by, for instance, companies selling products, that they be accurate statements so that we don't get a misperception about a product; would you agree with that?
A No. Maybe I'm just unusually cynical. But I've not thought for some time that ads were going to be completely accurate because people are trying to sell products.
Q There's a difference between puffing and

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lying, isn't there, though?
A Well, I would think so, but, again, ads are ads, and companies aren't about to tell you very negative things about a product they're selling.
Q How about negative things that reflect health and something that could kill a person? Do you think companies shouldn't tell you about something that could kill you?
A I can't remember very many car ads which do tell you that you can kill yourself in a car.
Q Are cars, when they're used as intended and just driving along without an accident, they're not going to kill you, are they?
A I think 25 to 3,000, 4,000 pounds can kill you.
Q If you have an accident?
A If you have an accident, and you could be driving safely and have one.
Q And you're familiar, are you not, through your research, that cigarettes, when used as intended, people just smoking them, not abusing them, can kill people?

A Well, they can cause health problems, yes.
Q Let me show you a document which is in evidence. It's Exhibit 2722 from the Tobacco Institute, April 15, 1968. If I can help you, because of the hour, you recognize the Tobacco Institute. We talked about the Tobacco Institute just a minute ago.
A Yes.
Q Do you see here in 1968 in this memorandum, the statement is "No. 1, Our 1968 public relation program requires substantial revision to a degree still uncertain; and No. 2, our basic position in the cigarette controversy is subject to the charge and may be subject to a finding that we are making false or misleading statements to promote the sale of cigarettes."
In your research, Professor, as you looked through the documents, were you shown this document or documents like it from the industry indicating it was aware that it was making false and misleading statements?
MR. OHLEMEYER: Objection, Your Honor, that's argumentative.
THE COURT: Sustained.

Q Professor --
THE COURT: You can ask her if she saw the statement.
MR. WESTBROOK: Thank you, Your Honor.
Q Professor, had you seen, before I handed you the document, the statement from the Tobacco Institute in this memorandum that "Our basic

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position in the cigarette controversy is subject to the charge and may be subject to a finding that we are making false or misleading statements to promote the sale of cigarettes."

Had you seen that statement before from the industry?

A No. Because, remember, I'm looking for common knowledge and publications. Public information.

Q You hadn't seen any of the internal documents?

A No.

MR. WESTBROOK: Thank you, Professor.

THE COURT: Mr. Ohlemeyer, any redirect?

MR. OHLEMEYER: Very briefly.

REDIRECT EXAMINATION

BY MR. OHLEMEYER:

Q Dr. Hoff, in Exhibit 7016, which was that Tobacco Institute ad.

A Yes, the one that was in the Post and Times, yes.

Q Do you notice there are some attachments to that ad, what are labeled acknowledgements from senators?

A Yes, I did. I don't have it in front of me right now, but I saw it. What did it say?

Q And does it appear that there are about 11 quotes from Senators and about 49 quotes from members of the House of Representatives?

A Yes.

Q And for the most part, they're favorable, aren't they, with respect to that advertisement?

A Let me just take a quick look.

Q Let me, to move it along, let me show you on the page that says "Acknowledgements from Senators." Do you see where it says Hartkey from Indiana?

A Yes.

Q Read what he said about that ad.

A I still don't have it. Okay. I see it. He says, "Such ads contribute to fuller understanding and judgment of the issues, and I want you to know that your contribution is helpful and welcomed."

Q Now, Dr. Hoff, without making light of the subject, because it's a serious subject, does humor play a role in disseminating common knowledge about the risks associated with cigarette smoking?

A Yes. Because one of the ways we acknowledge common knowledge that happens to be negative, as I am maintaining it is with respect to tobacco, is that we use humor to acknowledge it and to deflect it. It helps

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us accept it better. And so, yes is the answer to the question. It serves that purpose.

Q Do you see exhibit that you were handed, 26324, which is -- looks like the computer printout of that newspaper article. Different exhibit.

A Different exhibit. Okay. What's the number

again?

Q 26324.

A I got it. Here we go.

Q Do you see at the bottom of that article they refer to a ditty, D-I-T-T-Y?

A No, I don't.

Q The bottom of the first page, I'm sorry.

A Bottom of the first page. "If only people would stop singing the old ditty, ashes to ashes."

Q "And dust to dust. If the Camels don't get you, the Fatimas must."

A Yes.

Q What's a ditty?

A A ditty is a simple rhyme that kids are taught, that they make up.

Q Is that an example of how common knowledge gets spread?

A Yes.

Q Even in 1982?

A Yes.

Q And finally, Dr. Hoff, does common knowledge, as you've describe it about smoking and health, get formed and created and spread despite the fact that cigarette

companies advertise?

A Yes. What I think has to be pointed out is that even at the height of the popularity of smoking in the twenties and '30s, because of the movies and a lot of other cultural changes, kids were still raised not to smoke. Their parents still told them not to smoke. So the common knowledge existed negatively with respect to cigarettes even while more and more people were smoking them.

What is so hard, I think, sometimes for people to understand about common knowledge is that we may have these things in our heads, things to do or not to do, but we don't always act on them. And consequently, humans are risk takers and we do things that we know we shouldn't do. We gamble or have unsafe sex or drive when we're drunk. And we smoke even though our common knowledge tells us it's a threat to our health.

MR. OHLEMEYER: That's all I have. Thank you, Doctor.

THE COURT: Mr. Westbrook.

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RECROSS-EXAMINATION
BY MR. WESTBROOK:
Q Professor, you're not telling the jury that Mrs. Wiley took a risk and decided to smoke, are you?
A Pardon me? I didn't hear the last part.
Q You're not telling the jury that Mrs. Wiley took a risk and decided to smoke, are you?
A I'm certainly not. I'm just surprised that Mrs. Wiley is being inserted so late in the proceedings here, because I thought that that was what the case was about and not necessarily about direct smoking and common knowledge about direct smoking.
Q Do you know that Mrs. Wiley was a nonsmoker?
A Yes, I do. Yes.

MR. WESTBROOK: Thank you, Professor.

THE WITNESS: Thank you.

THE COURT: Thank you very much. You may step down.

MR. WAGNER: Judge, may we approach a second?

THE COURT: Please.

(Bench discussion)

THE COURT: Ladies and gentlemen, the next witness, I've been advised, will take quite some time, and I know there's some personal matters some of us may need to attend to this evening. The conversation with the lawyers has convinced me, number one, all the evidence in this case will be completed Monday. My plan, and I tell you this for planning purposes. My plan is, as you recall, I granted three hours a side on preliminary opening statements, each side had three hours.

On final statements, because there's so much evidence and so much testimony that they have a right to comment upon, each side will be given a total of six hours. Whether they use that six hours, I don't know. But they'll have six hours on each side.

Obviously, you'll have different lawyers speaking to you at different times, and we'll take breaks. We're not going to sit in here six hours and listen.

My plan at this point, we will begin the plaintiffs' opening statement Tuesday morning at 8:00 a.m. Plaintiff will do

about four to four and a half hours on Tuesday. As I think I told you originally, since the burden is on the plaintiff in this case, plaintiff has an opportunity to begin opening statements and to finish opening statements. So the plaintiffs are going to do about four and a half hours on Tuesday. The defense will have an opportunity to begin their closing statement on Tuesday and then it will no doubt carry into Wednesday

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morning.
The defendant will then have another hour and a half or so on Wednesday morning. Following that, and my best guess is sometime Wednesday afternoon, hopefully early in the afternoon, I will read the final instructions to the jury and the case will be given to the jury to deliberate.
And the following I'm going to tell you for your own purposes: If there is no verdict rendered Wednesday night in this matter, you will be all kept together in a hotel, not in the same room, obviously. You will all have a room. But we're going to keep -- what I'm going to do, and the word

we use for that is sequestered. The jury will be sequestered from the time the case is given to you to make decision upon until there is a decision. So you'll be kept in a hotel Wednesday night. I just wanted to tell you that for purposes, you may want somebody to bring you down here Wednesday morning, not leave your car in the parking lot. And you might bring a change of clothes and some personal items Wednesday.
But that's our plan at this point, and there's really no reason to think that that won't happen the way I have suggested to Counsel. So we're all in hopes that that will happen.
Now, remember, we have not concluded yet, so don't start talking about it, don't start deliberating, don't talk to your friends or family, don't read anything in the newspaper about the case or see anything on television. Remember, leave your notes in the jury room this evening; and under those instructions, I will see you Monday morning at 8:30.
Good evening.

MR. CASSELL: All rise.
THE COURT: All right. Be seated. Jury is not now present.
Besides your last witness, Mr. Ohlemeyer, you have some matters for the deposition you're going to try to offer, if I understand?
MR. OHLEMEYER: Correct.
THE COURT: Any other evidence?
MR. OHLEMEYER: I think there are a couple of documents, I think, perhaps that a couple of the holding companies or others might want to introduce into evidence, but we can take all that up first thing Monday morning. I don't think there is anything controversial or contentious.
THE COURT: My thought, and I've looked at final instructions, Counsel, and perhaps Monday evening we can all get together on final instructions.
Do you all have copies of the other

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side's final instructions?
MR. OHLEMEYER: I think so.
THE COURT: All right. I have reviewed defendants' bench brief on the

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rebuttal witness issue. Plaintiffs' response to that. Plaintiffs submitted a proposed three rebuttal witnesses to be called, together with a synopsis of their testimony, and how the plaintiffs feel that it does, in fact, rebut.

I think -- at the outset I'm going to say I think the defendants' view of rebuttal evidence in Indiana is perhaps too narrow. I understand the basic concept, but the Court has to have some -- provide some latitude in the matter.

On the Dr. Loehrer, is that the pronunciation?

MR. MOTLEY: Yes, Your Honor. Loehrer, I'm told.

THE COURT: Loehrer testimony, as it -- the synopsis indicates, and as I view the proffer here, that testimony would be permissible in its entirety.

As to Dr. Cummings, paragraph 1 would be permissible, paragraph 2 would not. I don't view that as rebuttal evidence. Paragraph 3 would be permissible.

The testimony of Dr. Garfinkel would be

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permissible in all instances.

Anything else we need to talk about tonight, Counsel?

MR. MOTLEY: Do you want to make a decision on Mr. Wiley's deposition, Your Honor, whether -- you know, we have that generic objection.

THE COURT: We can talk about the generic objection right now. That's probably a good idea, Counselor. And I propose the question to Mr. Ohlemeyer. It's quite unusual to submit a deposition of a witness who has testified.

MR. OHLEMEYER: Well, the trial rule says that the deposition of a party can be used for any purpose.

THE COURT: I agree.

MR. OHLEMEYER: And I think cross-examining a witness in court is one way of eliciting evidence that the jury can consider. I think to the extent it's relevant and probative of the issues in the case, testimony the witness gave out of court on the same subject at a different point in time is also probative and relevant

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on the issue to be decided, and we've done our best to restrict our designations to those types of topics, on those types of issues.

THE COURT: All right. Thank you, Counselor.

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Mr. Motley, any generic objections?

MR. MOTLEY: Your Honor, most, if not all, of these are subject matters that were gone -- Mr. Wiley has been here every day, every minute of every day. He was on the stand. He underwent a rigorous cross-examination on all these subject matters. And there's no reason why if he had asked him a question, did you say XYZ and he says no, I didn't, and then he confront him with his deposition.

It's rather unusual, I respectfully suggest for a man to be sitting in here, and the defendants, if they want to call him, put him on the witness stand -- I think in our papers, Your Honor, we compared to ask the same general questions. They want to call Mr. Wiley in their case? They didn't list him, but I can't imagine Mr. Wiley

wouldn't tell the truth.

But to sit here and read his deposition while he's sitting here in the courtroom available is just an extraordinary procedure. They've already been into these subject matters with him when he was on the stand on cross-examination, so we object to all of this as -- and I don't know what you'd call this as redundant, repetitive, cumulative, for all those reasons.

Mr. Wagner could probably give me a few more words to throw in there, Judge, on my objection, but we do object.

MR. WAGNER: Judge, the trial rule says that the testimony of -- deposition testimony of a party can be used for any purpose.

MR. MOTLEY: If he was sitting on the witness stand, Judge, he asked him a question about Reader's Digest and he answered, how many times has Mr. Wagner objected about asked and answered and you don't let me ask the same question twice. That's what they want to do. They didn't like his answer when he was sitting up here;

now they want to read the deposition.

THE COURT: Is some of this cumulative, Mr. Ohlemeyer?

MR. OHLEMEYER: Your Honor, I don't think it is because it all relates to the time at which it was -- I don't disagree, there may be some things that perhaps he was impeached with. And I think, as I understand the law of impeachment, it is substantive evidence, his prior inconsistent statement. To that extent, it might be, but I think there are other areas, Your Honor, that are not part of Mr. Wiley's direct examination that wouldn't be cumulative, and I'd be happy to take a closer look at it.

MR. MOTLEY: I just -- Judge, taking a closer look at it, it's just a

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rather extraordinary situation when the man is here. It wasn't like he's infirmed and Your Honor cut off cross-examination on the grounds that he wasn't well or whatever other reason, and they could present some reason why they didn't confront him. But they did; and if they didn't, they should have.

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MR. OHLEMEYER: Well, Your Honor, we could call Mr. Wiley as a witness in our case technically, I think, but I don't propose to do that. You know, I understand Your Honor has discretion to any mode or order of evidence. This is something that isn't that unusual as Mr. Motley points out. The last time we --

MR. WAGNER: I've got a trial rule that governs, Your Honor.

THE COURT: Well --

MR. WAGNER: A deposition can be used for any purpose.

THE COURT: There's no question about that. I agree.

I think -- I don't think your general objection is well taken. But I'll tell you, over the weekend I'm going to look at your designations and his objections and try to remember and look at my notes. Because we're not going to go through the same stuff again and again.

MR. OHLEMEYER: I understand that.

THE COURT: But I'm going to overrule the general objection, but I may

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pare this down a little bit.

MR. OHLEMEYER: If I may, before we go.

THE COURT: Go ahead. We're not leaving yet.

MR. OHLEMEYER: My understanding is --

MR. MOTLEY: Judge, excuse me. Let me finish this one little thing up. Do you have the deposition of Mr. Wiley?

THE COURT: Yes, I do.

MR. MOTLEY: You've got the deposition and the transcription.

Do you have the transcript of the trial?

THE COURT: I have the transcript.

MR. JOHN YOUNG: It's attached to our motion.

MR. OHLEMEYER: Your Honor, with respect to the issue of rebuttal, if I understand what Mr. Motley is saying, he can do the direct examination of these three witnesses in an hour.

THE COURT: That's what he said.

MR. MOTLEY: That's exactly what I

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said.

MR. OHLEMEYER: What I've asked

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Your Honor to do is to reconsider Dr. Loehrer for this reason. The direct examination of Dr. Roggli was in point of fact the most defensive direct examination I've ever seen.

They took our opening statement and had Dr. Roggli refute it point by point by point, and that is exactly what they now want this witness to do.

They deposed Dr. Bennett, they deposed Dr. Porter, they knew what our contentions were, they knew what our case in chief was going to look like because they heard our opening statement. They chose in their case in chief to put their witness on to specifically talk about pancreatic cancer and breast cancer, and they did it in great -- remember how long Dr. Roggli was on the stand?

THE COURT: I remember.

MR. OHLEMEYER: For that reason, I think Dr. Loehrer is not proper rebuttal, because it is a matter that was not only in

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their case in chief, it was covered in their case in chief in great detail with full knowledge what Dr. Bennett and Dr. Porter were going to say.

MR. WAGNER: And could I add just one more thing, too?

THE COURT: Go ahead.

MR. WAGNER: Remember they even gave Dr. Roggli one of the slides that Dr. Porter had looked at and asked him to opine about that particular slide that Dr. Porter was going to come here and testify about. So they completely anticipated all that testimony during their case in chief.

MR. MOTLEY: Your Honor, I was very specific and direct and focussed in what I said we wanted to ask Dr. Loehrer -- Loehrer. I'll learn his name by Sunday tonight. Dr. Loehrer, we were very specific. We cited to Your Honor the transcript testimony of what we wanted to ask Dr. Loehrer, and Your Honor has looked at all of this and I see no reason to reconsider it, Judge.

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They came in here with a false proposition that there's no such thing as rebuttal. Your Honor has rejected that. We very specifically -- remember, I told you, Judge, I said I will give you chapter and verse. I don't know what more I could do and focus on what we think is rebuttal, and Your Honor has gone through it very deliberately and very carefully and you told us what items we can and what items we can't. There's no basis for reconsideration here.

MR. WAGNER: Judge --

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MR. OHLEMEYER: I could lay aside to this transcript and this brief the trial testimony on these same subjects elicited through Dr. Roggli. I think this is different than the other two.

MR. MOTLEY: No, it's not, Judge. In fact, this man is a clinician. This man is a hands-on treating clinician and Dr. Roggli is a pathologist. So there's two different kinds of testimony. Even if they were right, which they're not, because some of the testimony that came from their

witnesses was somewhat amazing.

MR. WAGNER: Judge, if I could --

THE COURT: Go ahead.

MR. WAGNER: To sort of lay this out for a moment. Before trial our witnesses were deposed. Before trial, I'm talking about our medical witnesses, before trial our medical witness disclosures said that they were going to testify that Mrs. Wiley had a pancreatic cancer primary. During the course of the trial, the plaintiffs' medical witnesses each addressed that subject and said why it ain't so that she had a primary pancreatic cancer.

Now, how can they now come in and say we didn't get a chance to rebut that, because they testified to all this during their case in chief. And none of these witnesses, including Dr. Loehrer or whatever his name is, was on their witness list.

Now, Judge, Mr. Motley always talks about fairness, here we are at the close of trial, now we've got a brand new witness who is going to come in here, a medical witness. We don't know anything about it. He wasn't

on their witness list before trial. We never had a chance to do anything with this witness, and he's going to inject new issues into the case, when they had a clear, 100 percent opportunity to present their case on the very issues that they knew we were contending and they were contending during their case in chief and, in fact, their medical witnesses did address primary pancreatic cancer and excluded it.

MR. MOTLEY: Your Honor, I think I've done exactly what I told you I would do. I narrowed it down and I said we would be less than an hour.

MR. WAGNER: It's not a question of how long it takes.

THE COURT: I understand that. I'm still comfortable with my original ruling on this. I'm not going to tell them they cannot put on a rebuttal if it is truly rebuttal, and I believe that it is.

MR. MOTLEY: Judge, what time did you say we were starting Monday morning?

THE COURT: We're going to start at

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8:30 Monday morning, but Tuesday morning, be

ready to go at 8:00.

We're still on the record here. I want to make some other rulings.

MR. MOTLEY: I'm sorry, Your Honor.

THE COURT: The Court was asked to make determinations regarding whether certain statements that have been admitted against one or two or three defendants should be admitted as to all defendants on the conspiracy theory.

The Court previously has ruled on the fact that, by preponderance of the evidence and for evidentiary purposes only, plaintiffs have shown such an existence of a conspiracy, the declarant, and the party against whom the statements are offered here, all defendants, part of the conspiracy. The declarant and the party against whom -- the statements themselves were made during the course of the conspiracy and in furtherance thereof; with that being said as a preliminary matter, and that applies to the following exhibits which the Court -- the jury will be instructed now apply to all defendants. And there are

several of these, Counsel. I'll go through these, but I'm sure they will be available from the court reporter.

These are documents entered into evidence, March the 4th against specific defendants, and the following documents will be -- the jury will be instructed the following documents will apply to all defendants in this case: 14398, 26462, 15200, 26414, 6819, 20460, 18107, 21783, 29115, 6147, 1802, 1531, 10484, 5153, 10405, 14131, 11371, 11371.03, 5083, 26477, 30864, 30865.

Documents previously admitted into evidence, previously before March the 4th against specific defendants, and these documents will be -- the jury will be instructed these documents may be considered as to all defendants: 140, 284, 319, 435, 572, 1286, 1378, 1409, 3793, 4536, 5260, 6045, 7086, 7129, 8935, 8947, 9107, 9108, 9338, 9448, 9645, 10245, 10513, 10791, 14333, 16721, 18064, 19671, 20462, 21387, 21437, 21747, 24389, that's also known as Exhibit 26. 24877, 25028, 25973, 30941,

33608, 33999, 35963A, 36104, 36105. Plaintiffs' Exhibit 56, Plaintiffs' 57.

Documents admitted March 4, 1998, as to the following defendants, RJR Nabisco Holdings, will now be applied -- the following documents will be applied to all defendants: 26431, 26432, 26429, 26428, 26439, 26440, 26427, 11923.

The documents originally offered as

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against Loews, these documents will be as to all defendants: 7636, 8137, 12673, 12671.

Documents originally to American Brands, the following documents will apply to all defendants: 8108, 19671, 6436, 6449, 25141, 24388.

Philip Morris documents originally admitted against that company now will apply to all: 31684, 31685, 31659, 17815, 20823, 17801, 17800, 22624, 11924.

BAT Industries documents originally admitted against BAT Industries will now be -- the following documents will be admitted as to all: 8878, 319, 3900, 2818, 29026, 8831, 5338, 573, 21387, 9338, 437, 21404, 90.

The Plaintiffs had requested that statements, in terms of depositions that the Court advise the jury, I'm going to decline that request.

Plaintiffs' 71, I will decline that request.

Counsel, my thought will be -- would be to advise the jury of the particular number, and I know it takes a minute, but advise the jury of the particular exhibit which previously was limited without any further explanation as to the particular document.

I've noticed that the jury is taking fairly good notes as to exhibit numbers and things of that nature, so I'm not going to go through every document and say this is the document and hold it up. I will tell the jury the numbers of the documents that have been now applied to all defendants in this case.

MR. MOTLEY: Judge, may I make a suggestion in that regard?

THE COURT: Certainly.

MR. MOTLEY: Would it be appropriate, since we're going to have these

numbers in the record to, rather than having Your Honor having to recitate those things, to just give them the list? Give them a list?

THE COURT: I thought about that. I may do that.

MR. MOTLEY: Thank you.

THE COURT: Anything else we need to talk about from the plaintiff?

MR. MOTLEY: No, Your Honor.

THE COURT: From the defense?

MR. OHLEMEYER: Your Honor, will these rebuttal witnesses be made available Sunday evening for depositions?

THE COURT: When are they getting in town?

MR. MOTLEY: Your Honor, I think I can make Dr. -- as I told Your Honor earlier, Dr. Loehrer has a time problem he's got, so that may have to be done by

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telephone.
MR. WAGNER: Oh.
MR. MOTLEY: Oh, what?
THE COURT: I thought they were coming Sunday evening.

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MR. MOTLEY: The two from way away are coming Sunday evening; Dr. Cummings and Dr. Garfinkel. So they would be available Sunday evening. Dr. Loehrer is the one that I would have to check with. He's got patients all day Monday, and I don't think he can come over here Sunday night.
THE COURT: Where is he coming from? Lafayette?
MR. MOTLEY: He's in Indianapolis.
THE COURT: Indianapolis?
MR. MOTLEY: We'll check with Dr. Loehrer.
THE COURT: I don't think that's asking too much. I think he should be made available Sunday evening.
MR. MOTLEY: He's out of town until Saturday night. When he comes back, Jim will get in touch with me and we'll notify whomever they designate.
MR. OHLEMEYER: Me. (816)523-5728. And I'd like deposition Sunday evening.
THE COURT: Now, you can do these simultaneously.
MR. OHLEMEYER: Sure. Absolutely.

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THE COURT: The rule is that each rebuttal witness be made available for at least -- an hour enough?
MR. OHLEMEYER: If the direct is only going to take 20 minutes, Your Honor, it shouldn't be too difficult to depose them in 90.
MR. MOTLEY: I didn't say each 20 minutes.
MR. OHLEMEYER: You said you can do it all in an hour.
MR. MOTLEY: That's true. You don't have to divide.
THE COURT: Ninety minutes for each rebuttal witness. Sunday evening.
MR. WAGNER: Judge, could we request that they bring with them all documents pertaining to the bases for their opinions?
MR. MOTLEY: All documents? Are you talking about medical?
MR. WAGNER: That was the request that was done before trial when we had an opportunity to depose experts.
MR. MOTLEY: Judge, I'll check on

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that. I don't know that they're going to be -- what documents -- if there are any documents, any liability documents, I'm not going to ask them to bring their entire library from the National Cancer Institute

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down here.
MR. WAGNER: Counsel knows what we're talking about.
THE COURT: Anything that they've relied on in this particular case. That's a fair request.
MR. WAGNER: Anything that they've relied on to form their opinions in this case --
THE COURT: That's fair.
MR. WAGNER: -- especially the specific opinions that are set out in these disclosures.
THE COURT: That's fair. Have them bring those, too.
MR. MOTLEY: Now, Judge, what if we've already given them to them? Can we just list them then rather than fell half the trees in Georgia? In other words --
THE COURT: I can't believe there

is going to be that many documents involved here.
MR. MOTLEY: If they're corporate documents, he's right. I'm talking about all the medical journals and stuff they relied on.
THE COURT: Oh, no. No, no.
MR. MOTLEY: We'll give them a list of what medical, like the EPA report and all that. There's no need to give them another copy of that, I wouldn't think.
THE COURT: Anything you've already provided is all right. But if you have not provided something, they need to bring it.
Anything else, Mr. Wagner?
MR. WAGNER: Nothing I can think of right now, Judge.
MR. HILL: Your Honor, pursuant to your order that both sides could tender additional instructions, I've talked with Mark Dudley for the plaintiffs, and both sides will have a few additional instructions. May those be tendered to you on Monday?
THE COURT: Monday is fine,

Counselor.
MR. MOTLEY: We're redoing the language. I think they told you the same thing. They were redoing some of their language. We're going to redo some of our language, too.
THE COURT: That's fine. Anything else? Have a nice weekend.
(Proceedings were adjourned at 4:30 p.m. to be reconvened March 16, 1998, at 8:30 a.m.)

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EXHIBIT NOS.	RECEIVED	NOT RECEIVED
A1, A5, A6, A7, A8, A17, A23, A26, A27, A32, A60, A73, A76, A111, A115, A126, A137, A147, A190, A202, A221, A228, A242, A262, A264, A353, A365, A370, A371, A381, A382, A385, A386, A387, A388, A389, A390, A392, A407, A409, A418, A438, A441, A442, A469, A530, A555, A600, A603, A617, A634, A641, A648, B677, B680, B689, B690, B693, B740, B741, B756, B853, B860, B864, B1791	8576	

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